Civil Justice Reform Project

Summary of Findings & Recommendations

Honourable Coulter A. Osborne, Q.C.
November 2007

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Civil Justice Reform Project

Honourable Chris Bentley
The Honourable Chris Bentley
Attorney General
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M5G 2K1

November 20, 2007

Dear Mr. Attorney:

I am pleased to submit for your consideration the Summary of Findings and Recommendations of the Civil Justice Reform Project (the "Review").

The Summary of Findings and Recommendations is the first product of this Review, which I was asked to undertake in June of 2006. The Final Report of the Review will be delivered shortly.

As set out in the Terms of Reference, I have reviewed potential areas of reform and made recommendations to make the civil justice system more accessible and affordable. I believe the bulk of the recommendations are suitable for implementation within a reasonable time and, if implemented, will enhance access to justice for Ontarians.

Access to justice was the overarching issue in this Review, for both represented and unrepresented litigants. Central to my recommendations is the principle that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake. I have also duly considered the reality of regional differences within the province, in terms of legal culture, and procedural practices that respond to local needs.

With these objectives in mind, I have recommended changes to the Rules of Civil Procedure, several statutory amendments, potential improved scheduling practices for the judiciary, and best practices for the profession.

In gathering background information, comments and proposals for this Review, I have been aided enormously by members of the judiciary, the bar, and the public. I have also been greatly assisted by staff at the Ministry of the Attorney General, who have provided dedicated project management and research support.

I look forward to your considered response to the recommendations in this Summary of Findings and Recommendations.

Yours truly,

[original signed]

Coulter A. Osborne

Civil Justice Reform Project

LIST OF RECOMMENDATIONS

Judicial Resources

1. The need for additional Superior Court judicial resources in Central West (Brampton), Central South (Hamilton), Central East (Newmarket), and probably Toronto, is compelling. The federal government should forthwith give immediate consideration to an increase in the complement of Superior Court judges in those judicial centres. Any future appointments should expressly consider the need for bilingual judges within a given region.

2. In the longer term, the needs of the civil justice system from the standpoint of number of judges required should be the subject matter of a structured analysis by the federal government. That analysis should be undertaken after broadly based consultation with the Ministry of the Attorney General in Ontario. That consultation is necessary since the Ministry of the Attorney General has much of the evidence to support, or otherwise, the case for more judges. In our constitutional scheme of things, the problems are provincial. The solution in relation to the number of judges reasonably required is a federal matter. The analysis should also take account of the impact of family law and criminal matters in relation to judge time and courtroom availability for civil matters, and the need for bilingual judges.

Small Claims Court

3. The monetary jurisdiction of the Small Claims Court should be increased to $25,000. The increase should be staged. The court's monetary jurisdiction should be increased immediately to $15,000 with a further increase to $25,000 within two years.

4. Deputy judges should also be given limited jurisdiction to grant equitable remedies in relation to matters heard by the Small Claims Court.

5. If the court's monetary jurisdiction is increased to $25,000, there should be no right to appeal from a judgment of less than $1,500.

6. I would make no change in the Small Claims Court costs model.

7. I would urge the Office of the Chief Justice of the Superior Court, the Civil Rules Committee and the ministry, in consultation with the Law Society of Upper Canada, to consider whether a litigant should be able to be represented by an agent in Small Claims Court appeals and enforcement (contempt) matters in the Superior Court or the Divisional Court. This prospect is more palatable now that paralegals will be regulated by the Law Society. This requires an amendment to the *Courts of Justice Act* (s. 26), which references the *Law Society Act*. Amendment of Law Society by-laws may also be required.

8. I recommend that Small Claims Court administrative judges be appointed by the province either on a regional basis or on a basis determined by the volume of Small Claims Court business in particular geographic areas. Short of new judicial appointments, designated Small Claims Court deputy judge administrators should be made part of the Small Claims Court picture. These judges or deputy judge administrators would be responsible for ensuring, among other things, that Small Claims Court trial and settlement conference lists were manageable, i.e., not open-ended.

Simplified Procedure

9. The monetary jurisdiction of rule 76 should increase to $100,000 on a province-wide basis, to be implemented as soon as practicable.

10. Upon any increase to the monetary limit of rule 76, each party should be permitted to engage in up to two hours of discovery after giving due consideration to the cost of discovery in relation to the amounts or issues at stake.

11. The summary trial option should remain in place for all simplified procedure cases. It should, however, be amended to permit a brief opportunity for examination-in-chief or general statement of any party who has sworn an affidavit for the summary trial. I would allocate no more than 10 minutes for this statement or examination-in-chief, subject to an order of the pre-trial judge or master or the trial judge to extend this time.

12. The Civil Rules Committee should consider whether and how, in keeping with the principle of proportionality and without compromising procedural fairness, appeals from interlocutory orders made in simplified procedure cases ought to be prohibited or otherwise restricted.

Summary Disposition of Cases

13. Do not amend the test of "no genuine issue for trial" in rule 20.

14. Amend rule 20 to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed, including adverse inferences where a party fails to provide evidence of persons having personal knowledge of

contested facts. This power, however, ought not to be exercised where the interests of justice require that the issue be determined at trial.

15. Amend rule 20 to permit the court to direct a "mini-trial" on one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion. The same judicial official hearing the summary judgment motion would preside at the "mini-trial."

16. Eliminate the presumption of substantial indemnity costs against an unsuccessful moving party in a summary judgment motion in rule 20.06. Replace it with a rule conferring permissive authority on the court to impose substantial indemnity costs where it is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay.

17. Adopt a new summary trial mechanism, similar to rule 18A in British Columbia.

18. Confer on a judge hearing a summary judgment motion the authority to convert an unsuccessful summary judgment motion to a summary trial application for cases appropriate for summary trial determination. The judge should also be vested with the necessary powers to make appropriate trial management orders so as to get the case ready for summary trial determination.

19. Where practicable, the same judicial officer who grants leave to amend a pleading should preside over any subsequent rule 21 motions involving the same pleading.

Unrepresented Litigants

20. Undertake an independent needs assessment study, guided by a steering committee of civil legal service providers and chaired by PBLO. Funding from possible sources, such as The Law Foundation and the Ministry of the Attorney General ("MAG") should be explored. The objectives of the study should be to:

    a) Develop a profile of civil unrepresented litigants in Ontario and their points of interaction with the civil justice system that give rise to difficulties for unrepresented litigants themselves, court administrators and the courts;

    b) Determine the legal needs of unrepresented civil litigants, the scope and accessibility of existing legal services and where additional legal services may be provided to fill service gaps, geographically and in substantive civil practice areas; and

    c) Recommend the most cost-efficient and -effective means of providing legal information and assistance.

21. A committee of providers of legal information and resources (MAG, PBLO, Law Society of Upper Canada, Legal Aid), chaired by PBLO, should meet to coordinate the delivery of improved legal information and resources in the following four areas:

    a) General information about the civil justice system and its structure;

    b) Step-by-step procedural information to assist unrepresented litigants;

    c) Summaries of substantive areas of the law that would be of greatest assistance to most unrepresented litigants in civil proceedings;

    d) Procedural information on enforcement and compliance with court orders.

22. The committee should consider the most effective and accessible media for communicating this information to the public (e.g., printed material available at courts or community legal clinics; electronically through the Internet; or videotaped displays of court processes and acceptable court conduct).

23. Bar associations and civil litigators should continue to implement and offer pro bono services and programs where possible.

24. Ontario lawyers should be encouraged to consider new and innovative billing methods that promote access to justice for litigants with civil legal issues who would not otherwise be able to afford counsel.

25. As part of the review of legal aid announced in 2006, the 1997 McCamus recommendations with respect to civil legal aid should be revisited.

26. PBLO's efforts to develop a civil law self-help pilot project in Toronto should continue to be assisted by the Ministry of the Attorney General's Pro Bono Task Force. Funding from possible sources, such as The Law Foundation and MAG, should be explored. Expansion of the pilot project to other regions of the province should be considered pending an evaluation of its success, and after considering cost-effective service delivery options that are responsive to the needs of those who would otherwise be unable to access legal representation.

Civil Juries

27. The current regime governing the availability of civil juries set out in the *Courts of Justice Act* should be retained, except for simplified rule actions under rule 76 in which $50,000 or less is claimed. In those cases a party must obtain an order, on motion, to obtain a jury based on broad public interest grounds.

28. The *Courts of Justice Act* should be amended to permit the court to dispense with a jury on its own motion. It should prescribe the following test to be applied by the court when deciding whether or not to strike a jury notice:

    a) Whether justice will be served better with or without a jury, after considering all relevant factors, including the facts of the case, the technical nature of the evidence, the complexity or uncertainty of the relevant law, the predominance of substantive legal issues over factual issues, the interwoven issues of fact and law, and counsels' positions;

    b) Whether a party would be able to obtain a fair trial before a jury;

    c) Whether jury service would be an unwarranted inconvenience to jurors, considering the value, nature and importance of the matters, the parties' interests in a jury trial, and the likely duration of the trial; and

    d) Where, in the opinion of the court, inflammatory conduct by a party or counsel or inadmissible evidence has been placed before the jury.

Discovery

29. The phrase "relating to any matter in issue in the action" should be replaced with "relevant to any matter in issue in the action" in all rules relating to discovery. The effect of this recommendation is to discard the "semblance of relevance" test and replace it with a simple relevance test.

30. Amend rule 31 to provide that each party have up to a maximum of one day (seven hours) to examine parties adverse in interest, subject to agreement otherwise or a court order.

31. As a best practice, encourage parties to voluntarily answer questions at an examination for discovery that are objected to on the basis of relevance, as permitted under rule 34.12(2). In addition, encourage the court to consider the availability of the process in rule 34.12(2) when making the appropriate cost awards on refusals motions.

32. The Office of the Chief Justice of the Superior Court of Justice should consider issuing a Practice Direction that would state the court may refuse to grant any discovery relief, or may make appropriate cost awards on a discovery motion, where parties have failed to:

  a) Consider and, to the extent reasonable, apply the E-Discovery Guidelines and *The Sedona Canada Principles*, in particular, the requirement to meet and confer regarding the identification, preservation, collection, review and production of electronically stored information;

  b) Develop a written discovery plan addressing the most expeditious and cost-effective means of completing the discovery process in a manner that is proportionate to the needs of the action, including:

    i. The scope of documents to be preserved as determined by both relevance and application of the principle of proportionality (in the context of the costs associated with document searches and production being balanced with the needs of the particular case);

    ii. Dates for the exchange of sworn affidavits of documents;

    iii. Number of experts and timing of delivery of expert reports;

    iv. Time, cost and manner of production of documents from the parties and any third parties who may have relevant documents; and

    v. Names of those to be produced for oral discovery (an issue which may be relevant if a party is a corporation) and the dates and length of examinations.

Expert Evidence

33. I do not recommend the mandatory use of joint experts. However, in appropriate circumstances, early in the litigation process, parties should discuss jointly retaining a single expert to reduce costs and avoid unnecessary competing expert reports, consistent with the Discovery Task Force's best practices.

34. Amend rules 50.01, 76.10, 77.14, 77.15 and 78.10 to require the presiding judicial officer at pre-trials, settlement conferences and trial management conferences to consider and make orders as to the appropriate number of experts that may be called by each side and on particular issues and whether expert evidence is admissible.

35. Amend section 12 of the *Evidence Act* to:

    a) Make clear that a judge (or officer) presiding at pre-trial events (i.e., pre-trials, settlement conferences, trial management conferences), who may or may not be the presiding trial judge, may grant leave to call more than three experts (or fewer in simplified procedure cases). The residual discretion of the trial judge to vary a previous order on the number of experts will, I hope, be limited to situations where there has been a significant change in circumstances, or where manifest unfairness would result to a party at trial should they not be permitted to call additional experts.

    b) List the following factors for the court to consider in exercising its discretion on the appropriate number of experts:

        i. Whether the proposed number of experts is reasonably required for the fair and just resolution of the proceeding;

ii. Whether the proposed number of experts is consistent with the principle of keeping costs and the length of the proceeding proportionate to the amount or issues at stake;

iii. Any other factors relevant to the fair, just, expeditious and cost-effective resolution of the proceeding.

36. Adopt a new provision (in the Rules of Civil Procedure or *Evidence Act*) to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Require the expert, in an expert report, to certify that he or she is aware of and understands this duty.

37. Permit the presiding judicial official at pre-trials, settlement conferences and trial management conferences to order opposing experts in appropriate cases to:

a) Meet, on a without prejudice basis, to discuss one or more issues in the respective expert reports to identify, clarify and, one would hope, resolve issues on which the experts disagree and

b) Prepare a joint statement as to the areas of agreement, or reasons for continued disagreement

where in the opinion of the court

i. there may be room for agreement on some or all issues,

ii. the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court or

iii. cost or time savings or other benefits can be achieved proportionate to the amounts at stake or the issues involved in the case.

38. Amend the rules to require parties to discuss the number of experts and the timing for delivery of expert reports within 60 days of the action being set down for trial. As a default, rule 53.03 should be amended to require all expert reports to be exchanged within the 90/60/30 days before pre-trial or settlement conference, subject to the parties' agreement otherwise or court order.

39. Amend rule 53.03 to require all expert reports to include the following information:
    a) Expert's name, address and current curriculum vitae;
    b) A detailed description of the expert's qualifications and area of expertise;
    c) A description of the instructions provided to the expert;
    d) The nature of the opinion being sought and the specific issues to which the opinion relates;
    e) A description of research conducted by the expert to be able to reach his/her opinion;
    f) A description of the factual assumptions on which the opinion is based;
    g) The list of any documents relied upon in formulating the opinion; and
    h) The opinion and the basis for the opinion. Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion.

Litigation Management

40. Amend Rule 37.15 to:

    a) Permit the court to order that a case be subject to rule 37.15 management by an individual judge, master or case management master where it is of the opinion that the case could benefit from management by a single judicial official, after considering the criteria contained in rule 77.09.1(5). An order to make a case subject to rule 37.15 may be made by the court on its own initiative or on written request to the Regional Senior Judge of the respective judicial region where the case was commenced, copied to all other parties.

b) Allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference or a simplified process for motions to be made in writing with or without affidavits, similar to the processes in rules 76 and 77.

41. In the evaluation of rule 78, consider amending rule 78.12 to make the test and process to have a case subject to rule 77 case management consistent with the recommended process and test to have a case subject to individualized management under rule 37.15.

42. The Office of the Chief Justice of the Superior Court of Justice and the Ministry of the Attorney General should monitor access to case management masters for civil case managed actions in Ottawa to ensure that the complement of case management masters is sufficient to meet the civil case management needs there.

43. The Windsor Case Management Steering Committee should seek input from the local bench and bar as to whether any reforms to rule 77 in Essex County ought to be made.

44. The Civil Rules Committee should consider the future role of rule 77 in the province. Relevant to this investigation would be any plans to expand the

operation of rule 77, an assessment of the current operation of rule 77 in Windsor and Ottawa as an effective time- and cost-savings mechanism, the evaluation of rule 78 in Toronto, and alternative case management and non-case management models that may possibly be used to replace rule 77 (e.g., the ordinary procedure, rule 78, other models).

45. Any proceeding in which a party is self-represented should be managed to the extent required, either under an expanded rule 37.15 or under rules 77 and 78.

Pre-trials & Trial Management

46. Amend rule 50 to prescribe the dual purpose of a pre-trial conference: to discuss settlement of some or all of the issues, and to obtain any necessary orders and directions to ensure that the action is ready for trial and that the trial proceeds in an orderly and efficient manner.

47. Judges skilled in negotiation and with expertise in the relevant subject matter should, where possible, preside over pre-trial conferences.

48. Parties (or those with settlement authority) should be required to attend pre-trial conferences (or be available by telephone where physical attendance is not practicable).

49. Pre-trial judges should make any necessary trial management orders that promote the most efficient use of trial time and, in particular, should be vested with the authority to impose time limits on the presentation of each side's case, subject to a residual discretion in the trial judge to alter such orders where

unanticipated circumstances arise or in otherwise clear cases where the overall interests of justice require that they be amended.

50. Each region should adopt an administrative practice, similar to the approach used in Toronto, for scheduling pre-trials and tentative trial dates, to permit a sufficient block of time to be scheduled for pre-trials and trials and to avoid the necessity of parties having to appear in Assignment Court. Tentative trial dates should be confirmed at the pre-trial.

51. Pre-trials should be scheduled within four to six months of the trial.

52. The judiciary should be encouraged to use their inherent authority to better regulate the conduct of trials so that trials proceed in an orderly and efficient manner.

53. Amend rule 50.04 to permit the pre-trial judge to preside at trial where the parties consent.

54. The Civil Rules Committee should consider addressing bifurcation in a rule that would permit an order for bifurcation to be made on motion by any party or on the court's own initiative, after hearing from the parties. Any rule permitting bifurcation could reference some or all of the 14 factors listed in *Bourne v. Saunby*.

Appeals

55. The Law Commission of Ontario should undertake a review of the role of the Divisional Court *as a court of intermediate appellate jurisdiction and make* recommendations regarding the court's future role and jurisdiction. This

review should consider both the judicial review and appellate jurisdiction of the Divisional Court.

56. The Civil Rules Committee should consider and recommend to the Attorney General changes to the *Courts of Justice Act* so that only orders finally disposing of an action/application would be appealable to the Court of Appeal. Appeals from all other orders would be to the Divisional Court. The Civil Rules Committee can best determine if leave should be required and, if so, on what basis leave would be granted.

57. Appeals from summary judgment orders issued under rule 20 should be to the Court of Appeal if the amount in issue is otherwise within the jurisdiction of the Court of Appeal.

58. Appeals from awards through the *Arbitration Act* should be to the Court of Appeal if the amount involved (more than $50,000) brings the award within the monetary jurisdiction of the Court of Appeal.

Motion and Trial Scheduling

59. The Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider options to:

    a) Eliminate the requirement of personal attendance at Assignment Court and replace it with a new practice for setting trial dates (e.g., vest trial coordinators with the authority to set trial dates; use of an administrative form, jointly submitted by the parties, to permit trial dates to be set; use of teleconference hearings for Assignment Court; use of the Internet for fixing tentative trial dates).

    b) Direct and enforce time limits on trials, to ensure greater certainty in trial duration and improved trial scheduling.

c) Adopt and consistently enforce a policy with respect to adjournments.

d) Establish outside time standards within which trials ought to be heard, to be considered when scheduling trials and to provide a benchmark for litigants to know when a trial date is likely to be available upon the case being set down for trial.

60. The Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider:

a) The introduction of 9:00 or 9:30 a.m. chamber hearings to deal with *ex parte*, scheduling, consent or other matters that need less than 10 minutes and that would otherwise appear on motion lists. The chamber hearing would be in person or by teleconference.

b) The use of more specific time slots for the hearing of motions (e.g., morning and afternoon slots) to reduce wasted waiting time in court.

c) Greater use of teleconferencing for short motions. Amend rules 1.08 and 37 to permit the court to schedule and hear a matter by teleconference on its own initiative, or where requested by a party.

61. The Civil Rules Committee should consider changing the times for delivery of motion materials and the motion confirmation form by moving those times further back (e.g., seven and five days, respectively, before the motion is to be heard).

62. An early vetting procedure for long motions be introduced in court locations with busy long-motion lists (e.g., Brampton and Newmarket) and other locations as needed. This process would help ensure that the motion will be ready to proceed and would help in allotting an appropriate block of time for the hearing. Time limits for oral argument may also be set.

Venue

63. It seems to me that in a better world, plaintiffs should be able to start an action anywhere by filing the claim electronically. To the extent feasible, the claim should then electronically be moved to the venue stated in the claim.

64. There should be a more streamlined way of securing a change of venue (e.g., by filing a two-page simplified motion form with or without affidavit evidence, modeled after the simplified procedure and case management rules).

65. Venue change motions should be heard in writing or by telephone conference call, subject to a direction to the contrary if any oral argument is required. In clear cases, such as in the example cited above, the moving party should receive full indemnity costs payable forthwith.

66. In the alternative, amend rules 37.03(1), 38.03(1), 77.01(5) and 76.05(2) to permit a party to bring a motion to change venue at any court location.

Civility

67. The need for ethical behaviour is part of the curriculum in law schools now. Civility is a subset of ethical behaviour that should be emphasized in law schools where this does not now occur.

68. Law firms should provide instruction to articling students that would emphasize the importance of civility. Uncivil conduct by articling students should not be tolerated.

69. Judges should move to zero tolerance mode when confronted with uncivil behaviour in the courtroom. There is an array of remedies available,

including moral suasion, reporting the offending counsel to the Law Society, cost orders and, in egregious circumstances, the contempt process.

70. Lawyers should not be reluctant to report instances of uncivil behaviour to the Law Society. If the Law Society does not know about uncivil conduct, it can hardly be blamed for not responding to it.

Technology in the Civil Justice System

71. Parties and their counsel should be encouraged to explore methods of using technology to share information electronically to achieve time and cost savings. The judiciary and courts administration should make every reasonable effort to accommodate requests for the use of technology in individual cases, where possible.

72. Rules 1.08 and 37 should be amended to permit a party to propose, or the court to order on its own initiative, that any matter referred to in rule 1.08 be heard by telephone or video conference.

73. A committee of nine – comprised of a member of the bench, bar and courts administration from a small, medium and large court location in Ontario – be struck to make recommendations, jointly to the Attorney General, the Chief Justice of the Superior Court of Justice and the Chief Justice of Ontario, on technological improvements that may be made at each of the three court locations. Recommendations should be detailed, taking into consideration policy, legal, cost and operational impacts. They should also include a process to evaluate any improvements implemented.

74. Additional training should be provided to judges on all aspects of the use of technology in and out of the courtroom. This is a matter that is being addressed by the Judges' Technology Advisory Committee of the Canadian

Judicial Council. The National Judicial Institute and the Ministry of the Attorney General should participate, where possible, in assisting with such training.

Civil Rules Committee

75. The Civil Rules Committee itself should make recommendations to the Attorney General on the downsizing of the committee.

76. Committee membership lists and meeting agendas should be posted on the Ontario Courts website. The Civil Rules Committee should consider whether and to what extent minutes of its meetings might also be posted on the website.

77. The Civil Rules Committee, with input from the secretariat, should recommend options to the Attorney General, the Chief Justice of Ontario and the Chief Justice of the Superior Court for a strengthened secretariat mandate that is both responsive to immediate calls for rule reform and proactive in considering and analyzing potential short- and long-term civil justice reforms for Ontario.

Automobile Negligence Claims

78. The Superintendent of Financial Services, in conducting the next review of Part VI of the *Insurance Act* and the regulations under it, should consider the following questions:

    a) What has been the actual impact on loss costs and premiums of the transition from the earlier verbal threshold to the current threshold?

b) If it is found that some claims were excluded by the verbal threshold that would not be excluded by the deductible, who are the claimants excluded from pursuing remedies in the civil justice system and what are their injuries? These are both important public interest considerations; and

c) Should the deductible, now $30,000, applicable to some actions be increased, decreased or abandoned?

Proportionality & Cost of Litigation

79. The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.

80. Counsel should be required to prepare a litigation budget and review it with a client prior to commencing or defending any proceeding. This budget should be updated at least when examinations for discovery are completed. The Law Society of Upper Canada should also consider making this an express requirement for the profession under the Rules of Professional Conduct.

81. **The Civil Rules Committee should consider whether rule 57.01 should be amended to add, as a factor for the court to consider when making a cost award, the relative success of a party on one or more issues in the litigation in relation to all matters put in issue by that party. I make this recommendation not in the context of distributive cost orders (a subject on which the Court of Appeal has spoken), but rather in the context of court time which has been wasted in advancing frivolous claims or defences. It is one thing to advance claims or defences that manifestly have no merit. It is another thing to waste time doing it. Perhaps rule 57.01 (1) (e) is broad enough to capture my concern. I leave that to the Rules Committee.**

Civil Justice Reform Project

1. INTRODUCTION

Background

In 1996, the Ontario Civil Justice Review released its final report, which set out an overall strategy to make Ontario's civil justice system speedier, more streamlined and more efficient.[1] At about the same time, the Canadian Bar Association's (CBA) *Systems of Civil Justice Task Force Report* recommended the development of strategies and mechanisms to assist in the continued modernization of the civil justice system on a national basis.[2] The Civil Justice Review and the CBA reports triggered significant reforms in Ontario to enhance access to justice. Changes included the introduction of simplified procedures, case management, mandatory mediation and the increase in the monetary jurisdiction of the Small Claims Court to $10,000 from $6,000.

More than 10 years have passed since the Civil Justice Review and the CBA released their reports. Many of their recommendations have been implemented in Ontario, and throughout Canada generally, with positive results. Yet cost and delay (two related issues) continue to be cited nationally and provincially as formidable barriers that prevent average Canadians from accessing the civil justice system.

In 2001, the Government of Ontario and the Superior Court of Justice jointly appointed the Task Force on the Discovery Process in Ontario to identify problems with discovery and to make reform recommendations. In its 2003 report, the task force found that cost and delay associated with discovery are barriers to access to justice.[3] Accordingly, it recommended cost- and time-saving rule changes and the development of best practices or guidelines as norms for the conduct of discoveries. The task force acknowledged that not all discovery problems could be resolved by the imposition of more and new rules. For this reason, the task force's best practices guidelines were intended to address many problems that could be attributed to the adversarial "culture of litigation."

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[1] *Supplemental and Final Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, November 1996) [hereinafter, *Ontario Civil Justice Review*].

[2] *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association National Task force on Systems of Civil Justice, August, 1996) [hereinafter, *CBA Systems of Civil Justice Report*].

[3] *Report of the Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, 2003) [hereinafter, *Discovery Task Force Report*].

In March 2006, the Advocates' Society held a Policy Forum entitled *Streamlining the Ontario Civil Justice System* to search for creative ways to promote efficient, less expensive dispute resolution in our courts so that access to justice would be enhanced.[4]

In May and December 2006, the Canadian Forum on Civil Justice hosted a two-part national conference, *Into the Future: the Agenda for Civil Justice Reform*. The conference examined a variety of issues, including the status of civil justice reforms in Canada, impediments to effective reform and the development of a national direction for civil justice systems in the future.[5]

Other jurisdictions in Canada have recently undertaken formal reviews of their civil justice systems. In November 2006, the Civil Justice Reform Working Group of British Columbia's Justice Review Task Force released its report, *Effective and Affordable Civil Justice*.[6] The working group was formed to explore fundamental change to British Columbia's civil justice system, starting from the time a legal problem develops through the entire B.C. Supreme Court litigation process. The working group made three key recommendations to respond to a system that is said by many to be "[t]oo expensive, too complex, and too slow."[7]

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[4] A copy of a the Advocates' Society report arising from this policy forum, entitled *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, may be accessed online: The Advocates' Society <http://www.advocates.ca/pdf/Final_Report.pdf> [hereinafter Advocates' Society, *Streamlining the Ontario Civil Justice System*].

[5] Papers from the Canadian Forum on Civil Justice's *Into the Future* Conference may be accessed online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/publications/itf-en.php/>.

[6] Civil Justice Reform Working Group, British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November, 2006) online: BC Justice Review Task Force < http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf> [hereinafter, *BC Civil Justice Reform Working Group Report*].

[7] *Ibid.* at v - vii. The three key recommendations were:

And lawyers, judges and, most importantly, members of the public for whom the system exists have all voiced strong views in papers, conferences and the media about the cost of the civil justice system, trial delays and the apparent rise in the number of self-represented litigants in recent years.[8]

Civil Justice Reform Project Mandate and Overview

In June 2006, the Attorney General of Ontario, the Honourable Michael Bryant, asked that I lead the Civil Justice Reform Project (the "Review") and prepare a report addressing the issues raised in the Terms of Reference. My mandate is to review potential areas of reform and deliver recommendations which, if implemented, would make the civil justice system more accessible and affordable for Ontarians. The recommendations should be suitable for implementation within a reasonable time and provide meaningful results in enhancing access to justice. More specifically, I was asked to (a) identify key areas for reform; (b) develop reform options; and (c) make specific recommendations as to which of the proposed options would best achieve the Review's core objectives.

My Terms of Reference, which are reproduced at **Appendix A,** did not include family law or criminal matters. Nonetheless, I have tried to take reasonable account of the extent to which family and criminal matters consume resources, including judicial resources.

- The creation of a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems;
- A requirement that parties personally attend a new case planning conference before they actively engage the system beyond initiating or responding to a claim; and
- The creation of new Supreme Court Rules, incorporating several specific rule changes recommended by the working group.

[8] See, e.g., G. Cohen, Editorial, "The time has come for civil justice reform" *Law Times* (17 July 2006); K. Makin, "Help lawyerless litigants, judges urged: McLachlin expresses concern about flood of people representing themselves in court" *Globe & Mail* (13 December 2006); T. Tyler, "Ordinary citizens, unable to secure legal aid or pay punitive legal bills fight a 'David and Goliath' battle as they argue their own cases in court" *Toronto Star* (7 March 2007); K. Makin, "Top judge sounds alarm on trial delays" *Globe & Mail* (9 March 2007); B. Powell, "Justice summit to audit broken system; Public asked to join lawyers and judges in Ontario Bar Association talks" Toronto Star (13 March 2007) D02; Canadian Judicial Council, "Statement of Principles on Self-represented Litigants and Accused Persons" (September 2006) online: <http://www.cjc-ccm.gc.ca/cmslib/general/Final-Statement-of-Principles-SRL.pdf.>

Consistent with the Terms of Reference, I have throughout taken into account the following issues and principles, all of which are subsets of the broad access to justice theme:

- ☐ **Access:** This is the overarching issue. Both represented and unrepresented litigants must have real access to the civil justice system.
- ☐ **Proportionality**: The review that I have undertaken and my recommendations are designed to be responsive to the principle that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake.
- ☐ **Culture of litigation:** Recommendations should recognize that rule and other regulatory reform alone might not adequately respond to problems in the system. Ways to foster cultural change among the bench and bar should be considered. I view cultural change to involve more than civility. It includes the way business is done in the civil justice system, including the role of judges, lawyers and unrepresented litigants.

In framing and calibrating my recommendations, I have also tried to recognize that civil justice related problems differ throughout Ontario. For example, consultations revealed that problems with discovery and production are mainly Toronto problems. In addition, support for a substantial increase in the monetary jurisdiction of the Small Claims Court and the simplified procedure was significantly greater in Toronto than elsewhere. In the end, I concluded that modifying some central recommendations to take account of regional differences was preferable to having different rules in different parts of the province. I concluded that regional procedural refinements can be achieved through appropriate practice directions, that is, practice directions not inconsistent with the rules.

In the early stages of this Review, a consultation paper (reproduced at **Appendix B**) was prepared and distributed widely to judges, major bar groups and other users of the civil justice system. The consultation paper canvassed preliminary areas where reform was needed and options for change had been identified. It was not intended to, and did not, exhaustively list all matters that could be the subject of this Review.

A website was also created to increase awareness about the Review and to seek written submissions broadly from members of the public. General information about the Review and the consultation paper appeared on the website (http://www.civiljusticereform.jus.gov.on.ca/english/default.asp), which was accessible from the Ministry of the Attorney General's website and websites of various other organizations (e.g., Canadian Forum on Civil Justice, The Advocates' Society, County of Carleton Law Association).

Notices also appeared in the *Ontario Reports* and *The Lawyers Weekly*, inviting written submissions from the legal community. Over 60 written submissions were received from bar associations or other organizations, lawyers, members of the judiciary and members of the public.

In addition to written submissions, consultation meetings were held with bar associations in each region of the province, members of the judiciary, officials at the Ministry of the Attorney General, key litigant organizations, a number of law firms and other users of the civil justice system. A list of those consulted is attached at **Appendix C**. Relevant issues were not limited to those contained in the consultation paper. All submissions that I received were reviewed and, to the extent I thought warranted, taken into account.

As part of the consultation process, I met with the Chief Justice of Ontario – with both Chief Justice Roy McMurtry, as he then was, and Chief Justice Warren Winkler. I also met earlier with Chief Justice Winkler in his capacity as Toronto's Regional Senior Judge and with the Associate Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice, the Associate Chief Justice of the Superior Court of Justice, Ontario's Regional

Senior Judges, Superior Court judges in each region of the province and masters in Toronto and Ottawa.

I established three bar-bench advisory committees to provide advice in identifying and assessing reform options. These committees included a Toronto Advisory Committee and an Out-of-Toronto Advisory Committee, recognizing the reality that different solutions may be needed for different regions of the province.

Early in the consultation process, it became clear that several reforms were focused around the greater use of technology between parties and within the court. Accordingly, I established a Technology Committee to consider emerging issues including electronic discovery, electronic trials, electronic filing of documents and, most importantly, electronic document production – that is, how the parties and their counsel will share information in circumstances where the use of hard copy is impractical on cost and efficiency grounds.

Members of each of the Advisory Committees are set out below:

Out-of-Toronto Committee	**Toronto Committee**	**Technology Committee**
Tom Conway (Ottawa) Peter Cronyn (Ottawa) Carl Fleck (Sarnia) Kristopher Knutsen (Thunder Bay) Peter Kryworuk (London) Marvin Kurz (Brampton) William Leslie (Barrie) Michael O'Hara (Sudbury) William Sasso (Windsor) John Walker (Sault Ste. Marie)	Earl Cherniak Brian Bellmore John Callaghan Andrew Evangelista Peter Griffin Keith Landy Adrian Lang Jeff Leon John McLeish Paul Pape Neil Rabinovich Joel Richler Linda Rothstein Peter Wardle	Justice Colin Campbell Honourable James Farley Justice Thomas Granger Justice Russell Juriansz Glenn Smith Chris Walpole David Wires Susan Wortzman

Civil Justice Reform Project

I am grateful to all members of the three Advisory Committees for their invaluable contributions, not only in identifying needed changes but also in crafting the content and scope of those changes. Although the Technology Committee frequently spoke in what, to me, was something of a foreign language, I hope I got the message on the need to provide a structure for the cost-efficient sharing of relevant information among counsel and, in those cases which do not settle, in the courtroom.

I was also assisted by staff at the Ministry of the Attorney General, Court Services Division. They provided legal research and administrative support to the Advisory Committees and me. Without their able assistance I would still be at the starting gate. Ministry staff involved were:

Project Director:

- ☐ Mohan Sharma, Counsel, Court Services Division

Research Counsel:

- ☐ Caroline Mandell, Counsel, Court Services Division
- ☐ Todd Sherman, Counsel, Court Services Division
- ☐ Yasmin Shaker, Counsel, Court Services Division
- ☐ Brandon Parlette, Counsel, Court Services Division
- ☐ Laura Craig, Counsel, Court Services Division
- ☐ John Lee, Counsel, Policy Division

Research Assistants:

- ☐ Trish Coyle, Articling Student, Court Services Division
- ☐ Vaia Vagenas, Articling Student, Court Services Division

I particularly want to recognize the invaluable contributions of Mohan Sharma, the project's director, who worked efficiently and tirelessly in organizing our extensive consultation process and in collating the many submissions I received, both directly and through the consultations.

I should also express my appreciation to the many judges and lawyers who took the time to provide me with their views on what ails the civil justice system and on how it can be made better without blowing it up and starting all over again. Some made formal submissions; others simply told me what their views were. Both the bench and the bar, I think, are receptive to recommendations which, if implemented, will make the civil justice system work better. Many of their concerns and suggested solutions are shared by unrepresented litigants with whom we met or who made submissions to the Review.

I have tried to recognize that for every plaintiff, there is also a defendant. That is to say, access to justice has to be viewed not only from the standpoint of the party seeking relief, but also from the standpoint of the party from whom the relief is sought.

I think it is reasonable to say that meaningful improvement in access to justice can be achieved only if the justice system can provide mechanisms for the more timely resolution of litigated disputes at a reasonable cost to both the plaintiff and the defendant. That can be achieved only if we develop processes by which resources committed to a particular litigated issue are proportional to what is at stake, however that may be measured.

In addition to trying to recognize the principle of proportionality, I have attempted to develop recommendations that, as I have frequently put it at consultation meetings, will run the serious risk of working if they are implemented. I have also been mindful of the need that my recommendations should be implementable within a reasonable time frame.

On most issues there were competing views. No one suggested that doing nothing was a viable option.

2. JUDICIAL RESOURCES

In the course of this Review the issue of whether Ontario has enough judges in the civil courts was frequently raised, both by judges and members of the bar. The cry for more judges was heard most loudly in the Central West (Brampton), Central East (Newmarket), Central South (Hamilton), Toronto and East (Ottawa) regions.

This issue has also been the subject of comment by Chief Justice Smith, to date without any concurring response from the federal government. The Chief Justice's core rationale in her pursuit of more judges has been the significant increase in Ontario's population since 1990 and the federal government's failure to respond by appointing more Superior Court judges. This issue in our constitutional scheme of things involves the federal government. If there is a judicial complement problem, it is provincial. The solution (appointing more judges) lies with the federal government.

My Terms of Reference do not extend to either family law or criminal law. However, in trying to determine whether there is a case to be made for more federally appointed judges in Ontario, I cannot ignore the extent to which family and criminal matters consume judges' time. This is so because of the constitutional imperative to bring criminal maters to trial within a reasonable time (see s. 11(b) of the *Canadian Charter of Rights and Freedoms*) and the institutional, and sometimes statutory, imperative to assign priority to family law matters, particularly those that involve children.

There is no doubt that Ontario's population has increased since 1990. If all else is held constant, more people will yield more civil action activity and, for that matter, more criminal and family business for the courts.

I expect that if the central recommendations in this Report are implemented, there will be what I hope is a marked reduction in the cost and time required to bring a civil action that does not settle to trial. Thus, access to justice will be enhanced. Any efficiency gains derived from the implementation of this Review's recommendations will, of course, have to be taken into account in determining whether the complement of Ontario's judges should be increased and if so, where. The "if so, where" aspect of the analysis is important. As I will explain, in some judicial centres in Ontario the need for more judges is palpable to the extent that, I think, an overwhelming case exists for increasing the number of judges there.

Deploying judges by moving them between or within regions is not the answer. No region, with the possible exception of the North West, has a surplus of judges. At best, moving judges (which occurs now) represents a short-term demand-based solution. It is impractical to think that judges can be asked to sit in a region geographically remote from their offices and homes for any extended period.

Since merger of the courts in 1990, the judicial complement of Ontario's Superior Court has increased by 40, to a total of 223 judges[9] (a 22% increase since 1990). All of the increases in the judicial complement have been directly related to the need to bring criminal matters to trial within a reasonable time (the response to *Askov*) and to take account of Family Court expansion. No new resources have been added to specifically address civil caseloads.

According to Statistics Canada, Ontario's population increased by 26% between 1991 (10,084,885) and 2007 (12,726,336). In some discrete areas, population growth between the 1996 and 2001 censuses was significant: in Barrie (31%), Brampton (21%), Mississauga (13%), Whitby (18%) and Newmarket (15%). In other locations, population remained relatively constant over the same time period, either decreasing or increasing slightly – e.g., –7% in Sudbury to +7% in Ottawa.

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[9] Includes current vacancies, and does not include the executive of the court: the Chief Justice, the Associate Chief Justice, the Senior Family Judges and the Regional Senior Judges (11 judges in total). Based on data available as of June 2007.

Based on the best available data, Ontario has the highest population-to-judge ratio of all Canadian jurisdictions. That is to say, there are more people per judge in Ontario than is the case in any other province or territory in Canada. In addition, unlike Ontario, other provinces do not have Regional Senior Judges or Senior Family Judges.

Supernumerary judges have been statistically viewed as one-half of a regular sitting judge. There is no doubt that some supernumerary judges sit a full schedule or close to it. However, most have a sitting schedule of about half that of a non-supernumerary judge. Because of their reduced schedules, supernumerary judges frequently cannot be expected to preside over long trials.

In addition, although supernumerary judges are essential to the civil justice system, one has to recognize supernumerary status is a product of the judge's age and length of service. The election is that of the judge. The number of supernumerary judges in a particular region or judicial centre is unrelated to caseload demand. An election by a judge for supernumerary status does, however, trigger the appointment of a replacement for the supernumerary judge. As is the case with regular judges, some supernumerary judges deal with criminal and family law matters. To the extent that occurs, it is manifest the supernumerary judge is of no assistance in moving civil matters through the system.

While the statistics on population growth and population-to-judge ratios are compelling, they do not paint a complete picture of the crisis on the ground in some of Ontario's civil courts. In my view, a greater focus is needed on the problems at individual court locations.

A useful way to assess the relevant volume of business in a particular region or courthouse is to determine the number of defended actions there. This approach is based on the premise that judges, for the most part, are not involved in matters that are undefended. It should be noted that looking solely at the number of defended matters, although useful, does not take the length and complexity of those matters into account. In that context the number-of-defended-cases analysis is unfair to the Toronto region, which, anecdotally, tends to have longer and more complex cases than do other regions.

Taking the number of defended cases by region, or even by courthouse, and dividing by the number of judges available at a given time sheds some light on the workload of the court measured per judge. It does not, however, take into account the length and complexity of the matters before the court or the number of interlocutory proceedings that have to be accounted for. More significantly, unless judges who are assigned to family and criminal matters are factored out of the calculus, the results will not reasonably reflect the non-family civil work of the court on a per judge basis.

In any event, it is clear to me, based on the ratio of defended cases to judges and other submissions I heard or received, that more judges are urgently needed in the following regions: Central West (Brampton), Central South (Hamilton/Kitchener), Central East (Newmarket) and probably Toronto.

One does not have to spend much time in the Brampton and Newmarket courthouses to realize how busy those judicial centres are. Simply put, there are too many cases per available judge. Coupled with other aspects of the civil justice system, this has led to delays that should no longer be tolerated.

In my view, consideration of any increase should start with consultation at the local level. An analysis of several factors will be required, including local population growth, trends in civil case activity, increases in the volume of work in criminal and family matters, courtroom operating hours for civil matters compared to criminal and family matters, and any available data on the delays in having civil matters heard.

I should say something about the specialization and assignment of judges. Where resources permit, the system will work more efficiently if, at the management, motion and trial level, assigned judges have some experience in relation to the issues that are being litigated. That happens systemically in Toronto where the court is subdivided (commercial list, family, criminal, etc.). This approach, which I endorse, only works if there is a sufficient number of judges to populate several branches of the court.

I would expand specializations to identified cases, or classes of case, where feasible. Medical malpractice and hospital negligence cases provide a useful example. The problem with these cases is not their number but rather their length and complexity. If managed and tried by judges with some experience in such matters, these cases would move through the system much more efficiently.

I would add that I see no reason why the management judge should not be the trial judge, and hear motions, unless that judge is somehow involved in, or informed of, settlement discussions. In any case, it seems to me that the rule, not the exception, should permit a case management judge to be the trial judge, subject veto rights of the parties and the judge.

If changes are made that will free-up resources, it would be useful for the court to consider, at least experimentally, individual dockets for trial judges, that is, assigning a case to a particular judge at the outset. Given the state of available technology, the fact that in some regions judges travel should not foreclose that option. It has proved to be workable and efficient in the United States. It should be considered here at least for complex, time consuming matters.

Finally, during consultations, an ongoing need was noted for the appointment of more bilingual judges, particularly in Toronto (including the Court of Appeal). Any future appointments should consider the need for bilingual judges in regions which at a practical level are required to provide bilingual trials.

Recommendations (Judicial Resources)

- ☐ **The need for additional Superior Court judicial resources in Central West (Brampton), Central South (Hamilton/Kitchener), Central East (Newmarket), and probably Toronto, is compelling. The federal government should forthwith give immediate consideration to an increase in the complement of Superior Court judges in those judicial centres. Any future appointments should expressly consider the need for bilingual judges within a given region.**

- ☐ **In the longer term, the needs of the civil justice system from the standpoint of number of judges required should be the subject matter of a structured analysis by the federal government. That analysis should be undertaken after broadly based consultation with the Ministry of the Attorney General in Ontario. That consultation is necessary since the Ministry of the Attorney General has much of the evidence to support, or otherwise, the case for more judges. In our constitutional scheme of things, the problems are provincial. The solution in relation to the number of judges reasonably required is a federal matter. The analysis should also take account of the impact of family law and criminal matters in relation to judge time and courtroom availability for civil matters, and the need for bilingual judges.**

3. THE SMALL CLAIMS COURT

This court is frequently referred to as the people's court. Measured by unit volume of business, it is the busiest civil court in Ontario. In 2005-2006, 75,041 new proceedings were commenced in the Small Claims Court. By comparison, in the same time frame 63,251 new proceedings were commenced in the Superior Court of Justice.[10] Considering its volume of work, I heard few complaints about the Small Claims Court, including its judges and their decisions.

The Small Claims Court is hospitable to litigants who are not represented by counsel. Its procedures are straightforward. Twenty-one rules govern an action from commencement to trial and enforcement. Costs related to Small Claims Court matters are significantly lower than is the case in the Superior Court. The court is geared to, and does, dispense justice quickly.

There are limits in the Small Claims Court on the quantum of costs that may be recovered by a successful party, generally 15% of the value of the claim. In light of the court's existing monetary jurisdiction ($10,000), this means that the maximum cost exposure of an unsuccessful party to a successful party is $1,500, excluding disbursements and absent exceptional circumstances.

With four exceptions, Small Claims Court adjudicators are deputy judges. Deputy judges are lawyers appointed by the Regional Senior Judges in each region, subject to the approval of the Attorney General. There are approximately 400 deputy judges. They are paid a per diem of $232. Ontario has recently established a Deputy Judges' Remuneration Commission. I expect it will report by the end of this year and that deputy judges' remuneration will increase.

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[10] Ministry of the Attorney General, Court Services Division, *Civil and Small Claims Court Statistics 2005-06* [unpublished] at 7 and 50, citing FRANK data. Data from the Superior Court of Justice does not include bankruptcy or uncontested estate matters [hereinafter *Civil & Small Claims Court Statistics 2005-06*].

In addition to the 400 deputy judges, there are currently two full-time Small Claims Court provincial judges (both in Toronto). They are expected to retire from full-time service in September 2007 and November 2009, respectively. These two judges play an active role in the administration of the Small Claims Court. As well, there are two supernumerary provincial judges who sit on a per diem basis in Small Claims Court (one in Toronto and one in Ottawa).

The *Courts of Justice Act* has no provision for the appointment of provincial judges to the Small Claims Court. Thus, within a relatively short time, absent structural change, adjudication in Small Claims Court matters will all be by members of the Ontario bar – deputy judges.

The monetary jurisdiction of the Small Claims Court is prescribed by regulation under the *Courts of Justice Act*.[11] As of April 1, 2001, the jurisdiction of the court increased from $6,000 to its current level of $10,000.

The principal issues relating to the Small Claims Court are:

i. Whether the court's monetary jurisdiction should increase and, if so, by how much.

ii. Whether rights of appeal from decisions of the Small Claims Court should be changed.

iii. Whether the on-the ground administration of the Small Claims Court can be improved.

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[11] O. Reg 626/00.

On purely practical grounds, I have left the issue whether the Small Claims Court should be comprised exclusively of provincially appointed judges off the issues list. This is among the issues that I expect will be addressed by Ian Holloway who, at the request of the Attorney General, has conducted a review of the Small Claims Court. I understand that Mr. Holloway's report has been submitted to the ministry. It has not been released pending completion of this Review. Beyond that, as I noted in the introduction to this summary, I have tried to craft recommendations that, among other things, are implementable within a reasonable time. Thus I make no recommendation on whether the Small Claims Court bench should be provincially appointed full-time judges. I do, however, note that Ontario is not alone in having part-time, independent, non-judge Small Claims Court adjudicators.

Monetary Jurisdiction of the Small Claims Court

I think it is fair to say that there was a general consensus that the monetary jurisdiction of the Small Claims Court should be increased. To the extent that there was meaningful disagreement, it focused on the quantum of the increase. Most with whom I consulted supported an increase of the court's jurisdiction to $25,000. This is consistent with British Columbia, Alberta, the Yukon and Nova Scotia, which all have a $25,000 Small Claims Court limit. In addition, Saskatchewan has set in motion a process that will result in staged Small Claims Court limit increases to $25,000.

If the Small Claims Court monetary jurisdiction were increased to $25,000, the additional volume of cases resulting from the increase can be roughly estimated. In 2005-2006, 6,555 civil proceedings were commenced in the Superior Court of Justice for monetary amounts between $10,001 and $25,000 (1,756 between $10,001-$15,000, and another 4,799 were between $15,001-$25,000).[12] I accept that this may not fully reflect possible additional case activity. Some cases that have not been commenced in the Superior Court – due to higher court fees, the complexity of procedural rules, and the inability to be represented by an agent or paralegal in that court – may be commenced in the Small Claims Court upon an increase in its monetary jurisdiction, given the simpler and cheaper process it offers.

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[12] *Civil and Small Claims Court Statistics 2005-06, supra* note 10 at 56.

Significant practical problems would arise if the court's jurisdiction were increased to $25,000 immediately. Facilities would have to be expanded. Additional court staff and registrars would need to be hired. The cost of additional deputy judge per diems would have to be factored into the ministry's budget allocation, which could not be done accurately until the Deputy Judges' Remuneration Commission reports. More deputy judges would have to be appointed or the existing complement would have to allocate more of their time to Small Claims Court work. In the result, it seems clear to me that any meaningful increase in the monetary jurisdiction of the Small Claims Court should be staged.

Accompanying any monetary increase, deputy judges should also be given limited jurisdiction to grant equitable relief in relation to matters heard by the Small Claims Court. Equitable relief is different from money damages. Types of equitable relief includes court orders requiring parties to do or refrain from doing certain acts, or a court declaring the rights or duties of a party under a contract or law. Section 96(3) of the *Courts of Justice Act* currently precludes the granting of equitable relief by the Small Claims Court, requiring litigants to obtain such relief from the Superior Court. While this may make sense for significant equitable orders, it does not make sense in cases where the equitable relief relates to matters within the monetary jurisdiction of the court. I note that in Alberta, under its *Provincial Court Act*, provincial judges who preside over Small Claims Court matters have a limited power to grant equitable remedies in respect of a claim for debt, damages, return of personal property and specific performance where the value of the claim is within the monetary jurisdiction of the court.[13]

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[13] *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 9.6(1).

Small Claims Appeal Rights

The *Courts of Justice* Act provides that there is no right of appeal from a Small Claims Court judgment for the payment of money less than $500 or the return of an item valued at less than $500.

If the jurisdiction of the Small Claims Court is increased to $25,000, should the monetary limit restricting appeals be raised? I think that the answer to that question is, yes.

The restriction on the right to appeal serves to provide finality for comparatively minor claims that would not be economically efficient to appeal. It also prevents an excess of lower value claims from creating caseload pressures on the Divisional Court (the appellate forum). Although no statistics are available on the monetary value of appeals from the Small Claims Court to the Divisional Court, we do know that there are relatively few appeals from the Small Claims Court (186 in 2005-06).

If the appeal restriction had been increased proportionately with the monetary jurisdiction of the Small Claims Court (currently $10,000), there would now be no right of appeal from judgments of less than $5,000. In my view, a restriction on the right of appeal from judgment less than $5,000 is excessive. However, some restriction is justified. My recommendation is that there should be no appeal from judgments less than $1,500.

Small Claims Court Administration

On the third issue, several said that the Small Claims Court could benefit from improved oversight in its on-the-ground administration. Without a judge or deputy judge administrator to oversee the scheduling of motions, trials and settlement conferences, lists are frequently open-ended and matters may not be reached. This can result in adjournments and unnecessary cost and inconvenience to litigants, those representing litigants and witnesses. When the current provincially appointed judges who assist with the administration of the Small Claims Court retire, this problem can be expected to be more acute, especially in the higher volume court locations. It seems to me that new provincially appointed Small Claims Court administrative judges or deputy judge administrators ought to play a role in greater hands-on administration of the court.

Some identified person (my preference is that that person be a deputy judge) should be in charge from an administrative standpoint. Regional Senior Judges cannot reasonably be expected to be involved in that level of administration. If appointing administrative judges or deputy judge administrators is impractical, administrative officials should be put in place to ensure that all aspects of the on-the-ground operation of the Small Claims Court run efficiently. Over time, this would result in standardized procedures for filing claims and defences, avoiding delay at that point. It would also control the length of court lists and perhaps lead to morning and afternoon lists at least for short cases.

Recommendations (Small Claims Court)

- **The monetary jurisdiction of the Small Claims Court should be increased to $25,000. The increase should be staged. The court's monetary jurisdiction should be increased immediately to $15,000 with a further increase to $25,000 within two years.**

- **Deputy judges should also be given limited jurisdiction to grant equitable remedies in relation to matters heard by the Small Claims Court.**

- **If the court's monetary jurisdiction is increased to $25,000, there should be no right to appeal from a judgment of less than $1,500.**

- **I would make no change in the Small Claims Court costs model.**

- ☐ **I would urge the Office of the Chief Justice of the Superior Court, the Civil Rules Committee and the ministry, in consultation with the Law Society of Upper Canada, to consider whether a litigant should be able to be represented by an agent in Small Claims Court appeals and enforcement (contempt) matters in the Superior Court or the Divisional Court. This prospect is more palatable now that paralegals will be regulated by the Law Society. This requires an amendment to the *Courts of Justice Act* (s. 26), which references the *Law Society Act*. Amendment of Law Society by-laws may also be required.**

- ☐ **I recommend that Small Claims Court administrative judges be appointed by the province either on a regional basis or on a basis determined by the volume of Small Claims Court business in particular geographic areas. Short of new judicial appointments, designated Small Claims Court deputy judge administrators should be made part of the Small Claims Court picture. These judges or deputy judge administrators would be responsible for ensuring, among other things, that Small Claims Court trial and settlement conference lists were manageable, i.e., not open-ended.**

4. SIMPLIFIED PROCEDURE

In the course of this Review I heard many different views on the simplified procedure established in rule 76. In assessing these issues, I think further context would be helpful.

In 1996, the Civil Rules Committee established simplified procedure rule 76 for cases claiming $25,000 or less, as a four-year pilot project. At the time, there were concerns that lawyers and their clients were discouraged from pursuing smaller yet meritorious claims because of the disproportionately high cost of litigating them. The Ontario Civil Justice Review[14] and the Canadian Bar Association's (CBA) *Systems of Civil Justice Task Force Report* both recommended that a simplified procedure be established for claims of relatively modest amounts.[15] The CBA noted that simplified procedures were particularly suitable for simple contract cases (e.g. for services, employment, bills of exchange, cheques, promissory notes and acknowledgement of debt).[16]

In 2000, the Simplified Rules Subcommittee of the Civil Rules Committee evaluated the pilot project and concluded that rule 76 worked well, resulted in more cost-effective litigation without compromising procedural fairness, and promoted the expeditious resolution of disputes and more economical use of judicial time.

Rule 76 is now a permanent feature of the Rules of Civil Procedure. Its use is mandatory for claims valued at $50,000 or less. A plaintiff may commence an action under rule 76 for a claim over $50,000 and the claim will continue under that rule unless the defendant objects in the statement of defence.

Concerns about the rule 76 processes were mainly practical. Four issues emerged:

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[14] *Ontario Civil Justice Review, supra* note 1.

[15] *CBA Systems of Civil Justice Report, supra* note 2

[16] *Ibid.* at 41.

i. Should the monetary limit of the simplified procedure be raised?

ii. Should time-limited discovery be permitted in simplified procedure cases?

iii. Should the summary trial procedure be abolished or changed? And

iv. Should appeals from interlocutory orders be prohibited or restricted in simplified procedure cases?

Monetary Limit of the Simplified Procedure

In my view, the simplified procedure monetary limit should be raised. At Toronto consultations, there was considerable support for a substantial boost – some advocated to $250,000. Out-of-Toronto opinion favoured a more modest change. However, there was a general degree of support for some increase. Most of those consulted, in and out of Toronto, support an increase to $100,000 and this is what I recommend. I considered whether any increase should be calibrated geographically, i.e., higher in Toronto and lower elsewhere. In the end, I rejected that approach, which would encourage venue shopping and fragment the province for little useful purpose.

The streamlined rule 76 procedures, I believe, ought to be applicable to more cases. The rule offers significant cost- and time-saving mechanisms, such as the ability to bring motions without filing full motion records and affidavits, a relaxed summary judgment test and early disclosure of documents and witness names. Furthermore, it seems inevitable that if the Small Claims Court jurisdiction is increased, as I have recommended, the monetary limit for the simplified procedure should also be increased in recognition of the same proportionality principle that drives the increase in the Small Claims Court's monetary jurisdiction.

The primary concern with an increase to the monetary limit of rule 76 is that more complex cases, such as personal injury, will be subject to it. While this may occur, I do not see it as a sufficient reason to maintain the current limit. With the introduction of time-limited discovery, discussed below, the key differences between the simplified procedure and the ordinary procedure are primarily access to the time- and cost-saving processes that rule 76 offers. I do not see how complex cases will be prejudiced under rule 76 or why they should not equally share its benefits.

Currently, simplified procedure cases at the $50,000 limit comprise approximately 25% of actions commenced in the Superior Court of Justice (approximately 14,037 actions).[17] In 2005-06, 6,022 Superior Court cases were commenced seeking damages between $50,001 and $100,000. A straight-line calculation, without factoring in a reduction of cases from an increase in the Small Claims Court monetary jurisdiction, would result in an estimated 20,059 cases being subject to rule 76 (36% of all Superior Court actions). An increase in the Small Claims Court's monetary jurisdiction to $25,000 is estimated to result in a reduction in claims commenced in the Superior Court by roughly 6,555. My admittedly rough estimate is that about 6,000 additional cases would be subject to the simplified procedure and the Small Claims Court rules upon increases of the monetary jurisdictions to $100,000 and $25,000, respectively.

I have considered whether an increase to the monetary limit of the simplified procedure ought to be staged. An incremental increase would permit an evaluation of the effectiveness of the simplified procedure at an initial monetary increase prior to any further change. However, in the extensive consultations we have had, significant support was expressed for increasing the limit to $100,000 immediately so long as some oral discovery is permitted. A staged increase is more appropriate for the Small Claims Court. In the Small Claims Court, the volume of additional cases upon any increase may need to be carefully monitored on resource availability and planning grounds. An increase in the monetary limit of the simplified procedure does not raise the same concerns. Actions would simply move from the ordinary procedure stream in the Superior Court of Justice to the simplified procedure stream, to be heard in the same court by the same pool of judges. In fact, moving more cases to the simplified procedure stream should help relieve already strained Superior Court judicial resources, since in simplified procedure cases interlocutory proceedings are typically fewer and less complex and trials tend to be shorter.

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[17] *Civil & Small Claims Court Statistics 2005-06, supra* note 10.

I wish to make two final observations. First, if the monetary limit of the simplified procedure rule 76 is increased, some consideration should be given to setting a cap in cases of multiple plaintiffs. Currently, subrule 76.02(2) provides that if there are two or more plaintiffs, the simplified procedure applies if each of the plaintiffs' claims, considered separately, is within the monetary limit. Thus, if there are two plaintiffs in the same action, each with a claim valued at $50,000, that action must be commenced under the simplified procedure even though the plaintiffs' aggregated claims total $100,000. This may be the proper approach even if the monetary limit is increased. However, the Civil Rules Committee may wish to consider whether an increase in the complexity and significance of cases that may come with an increase in the monetary limit also justifies a reconsideration of the effect of subrule 76.02(2).

Second, I note that amendments to s. 19 of the *Courts of Justice Act* enacted by s. 3 of Schedule A to the *Access to Justice Act* will, as of October 1, 2007, effectively increase the appellate jurisdiction of the Divisional Court to matters involving a final order of a judge for a single or periodic payments of not more than $50,000. This change means that the Divisional Court will generally have jurisdiction over appeals of cases subject to the simplified procedure. If the monetary limit of the simplified procedure increases further, it may be appropriate to similarly amend the appellate jurisdiction of the Divisional Court in the *Courts of Justice Act*. Or it may make sense to allow the court's monetary appellate jurisdiction to be fixed and amended by regulation, rather than statute, to more easily accommodate future increases to the simplified procedure monetary limit.

Discovery in Simplified Procedure Cases

The prohibition on examinations for discovery was a key concern for many consulted. Judges and lawyers said that the absence of pre-trial discovery resulted in discoveries being conducted at trial and delayed meaningful settlement discussions. They noted that the problem is particularly acute where credibility is in issue. Some lawyers said that they feel that they are going to trial "blind." This concern was said to be especially relevant in personal injury litigation.

In approaching the discovery issue as related to simplified procedure cases, it makes considerable sense not to ignore the fact that most simplified procedure cases settle now.[18] Adding discovery to the process will impose that cost on all simplified procedure cases, including those that would have settled in the ordinary course of events. However, I think discovery will be a more important issue if the simplified procedure monetary limit is increased, as I think it should be.

Some jurisdictions that have a form of simplified procedure permit limited discovery – e.g., up to six hours in Alberta and two hours in British Columbia, per party. These discovery time limits can be expanded on consent or by order. Prince Edward Island, New Brunswick and Saskatchewan permit no oral discovery.

In dealing with the discovery issue, I have assumed that my recommendation to increase the simplified procedure monetary limit to $100,000 is accepted. This, in my view, strengthens the case for time-limited discoveries in simplified procedure cases. I also recognize that in the real world counsel in many simplified procedure cases are now having short discoveries on consent.

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[18] *Civil & Small Claims Court Statistics 2005-06, supra* note 10. In 2005-06, approximately 14,179 new simplified procedure cases were commenced, but only 2,026 simplified procedure cases were added to the trial list that year (or 14%). Accordingly, it would appear that about 85% settle before being set down for trial, and many more likely settle before trial.

I believe time-limited discoveries should be allowed in simplified procedure cases where the cost is in balance with the amounts or issues at stake. I do not think that discovery will be necessary in all cases. Counsel should be able to identify those cases where discovery would be a waste of time and money. I think, in particular, of debt collection cases where on a case-by-case assessment discovery may accomplish nothing beyond increasing costs.

Summary Trials in the Simplified Procedure

Lawyers and judges had divergent views on the summary trial procedure, although relatively few lawyers had any experience using it. Several said that the procedure for summary trials was still unfamiliar to many, and that the cost of preparing affidavits for summary trials can actually make them more expensive than traditional trials.

Some suggested that parties and counsel simply do not like summary trials because the process does not accommodate, at least to the usual degree, the ability of parties and witnesses to tell their story first hand. The concern expressed was that the first time the trial judge hears from witnesses is when they are being cross-examined. It was also suggested that reliance primarily on affidavit evidence is unfair, as evidence is submitted to the court in advance of the trial, before its credibility has been tested.

On the other hand, some cited the advantages of being able to carefully set out in writing the witnesses' evidence in chief, noting that some witnesses simply do not perform well on the stand. There were a handful of lawyers who liked the summary trial process and thought that it could work well for certain cases.

In several jurisdictions with a simplified stream for cases, the trial procedure is also simplified. A common feature of these simplified trials is that evidence is largely adduced by way of affidavit and cross-examination and oral argument at trial are time-limited.[19] In Manitoba, it is left to the court to determine whether summary trial procedures of this kind should be imposed.[20]

Approximately seven years ago, the 2000 Evaluation Report on rule 76 noted that summary trials were underused. It recommended that they be continued but that the rules be amended to allow the pre-trial judge, master or trial judge to permit more time to cross-examine on affidavits. This recommendation is now incorporated in rule 76.10(7) and 76.12(2), which confer authority to vary the times prescribed in the rules. The 2000 report also recommended simplifying the process for obtaining a summary trial. Now, parties may agree on the mode of trial (summary or ordinary trial) at the pre-trial conference. Where they are unable to agree, a pre-trial judge or master determines the mode of trial that is appropriate in the circumstances.[21]

2005-06 data reveals that only 126 summary trials were held throughout the province.[22] During consultations, unfamiliarity with the process and the cost of preparing affidavits were mentioned as reasons why the summary trial was avoided. While in some cases the cost of preparing an affidavit for a summary trial may be substantial, some lawyers did say that summary trials can be effective and cost-efficient. I recognize that summary trials may not be preferred or appropriate for all case types, but on balance I think it would be a step backwards to eliminate access to this mode of adjudication. Accordingly, I do not recommend the abolition of summary trials in simplified procedure cases. Nor do I think that it would make sense to eliminate the evidence by affidavit provisions of rule 76.

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[19] See, e.g., Alberta Rules of Court, Alta. Reg. 390/1968, r. 664 [hereinafter Alberta Rules]; New Brunswick Rules of Court, Regulation 82-73, r. 79.10 [hereinafter New Brunswick Rules]; Prince Edward Island Rules of Civil Procedure, r. 75.1.11 [hereinafter PEI Rules]; Saskatchewan Queen's Bench Practice Directive No. 8; Federal Court Rules S.O.R. 96/106, r. 299(1) [hereinafter Federal Rules].

[20] Manitoba Court of Queen's Bench Rules, Reg. 553/88, r. 20A(16)(e), (i) [hereinafter Manitoba Rules].

[21] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 76.10(6) [hereinafter Ontario Rules].

[22] *Civil and Small Claims Court Statistics 2005-06*, *supra* note 10 at 37.

In my view, the creation of multiple procedural tiers for different kinds of actions increases the complexity of the rules and often fosters confusion. I prefer to leave it to the parties to agree on the appropriate mode of trial, or where they are unable to agree, to have the presiding pre-trial judge or master make an order as to the mode of trial, as is currently prescribed in subrule 76.10(6). The summary trial process ought to be used more regularly in cases that are legally and factually straightforward. I would encourage the bench and bar at all pre-trials of simplified procedure cases to seriously consider its use.

The option of allowing some time-limited form of examination-in-chief may go some way to responding to the other key concerns about the summary trial. That is, allowing a brief examination-in-chief will permit a deponent to briefly tell his or her version of the events and become more comfortable in the witness box, and may assist counsel in setting up his or her case for the court. Moreover, where a deponent's credibility is in issue, judges may be better able to assess credibility where they have seen the deponent both examined in chief and cross-examined. I expect, however, that in many cases there will be no need for examinations-in-chief. Affidavit evidence may be more than sufficient, particularly in simpler or smaller cases, or where credibility is not in issue or where opposing parties do not need to cross-examine the deponent. All of these concerns become more relevant if the monetary limit for the simplified procedure is increased.

Any additional cost would be marginal. I hope that cost concerns, as well as considerations of proportionality, will result in parties conducting time-limited examinations-in-chief only where truly necessary and appropriate. I also believe that these changes to the summary trial procedure would allow flexibility in tailoring the features of the trial to the demands of each specific case, increase parties' confidence in the trial process by allowing them an opportunity to tell their stories, and render the summary trial procedure more workable for and appealing to counsel.

Appeals of Interlocutory Orders in Simplified Procedure Cases

There may be some wisdom to limiting appeals of non-final orders in simplified procedure cases, in keeping with the principle of proportionality. I note that in Alberta an appeal to the Court of Appeal or from a master to a judge may be brought only from a judgment or order finally determining all or some part of the substantive rights in issue in the action.[23] This rule, I understand, applies to all cases including the equivalent of our simplified procedure cases.

The simplified procedure rule seeks to promote cost-effective litigation and the expeditious resolution of disputes without compromising procedural fairness. In my view, some restriction on appeal rights from interlocutory orders would be consistent with these objectives and the principle that time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake. A restriction on appeals may take the form of a strict leave requirement, a limited appeal route to only one higher court or judicial officer, or a prohibition on all such appeals. I leave it to the Civil Rules Committee to consider these and any other options and to recommend a proposal to limit appeals of interlocutory orders in simplified procedure cases that will not compromise procedural fairness.

My preference is a model permitting appeals without leave if the order finally disposes of the action. If it does not finally dispose of the action, there should be no appeal unless leave is granted. In my view, such leave applications should be in writing. If leave is granted, the appeal should be heard by a single judge of the Divisional Court.

Recommendations (Simplified Procedure)

- ☐ **The monetary jurisdiction of rule 76 should increase to $100,000 on a province-wide basis, to be implemented as soon as practicable.**

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[23] Alberta Rules, r. 671.

- **Upon any increase to the monetary limit of rule 76, each party should be permitted to engage in up to two hours of discovery after giving due consideration to the cost of discovery in relation to the amounts or issues at stake.**

- **The summary trial option should remain in place for all simplified procedure cases. It should, however, be amended to permit a brief opportunity for examination-in-chief or general statement of any party who has sworn an affidavit for the summary trial. I would allocate no more than 10 minutes for this statement or examination-in-chief, subject to an order of the pre-trial judge or master or the trial judge to extend this time.**

- **The Civil Rules Committee should consider whether and how, in keeping with the principle of proportionality and without compromising procedural fairness, appeals from interlocutory orders made in simplified procedure cases ought to be prohibited or otherwise restricted.**

5. SUMMARY DISPOSITION OF CASES

Rule 20 of the Rules of Civil Procedure governs motions for summary judgment. It provides a mechanism in cases where there is "no genuine issue for trial" for all or part of a claim to be disposed of in a summary manner without a full trial. The primary inquiry on a motion for summary judgment is whether there is a dispute over a material fact that requires resolution by trial. The onus rests on the party seeking summary judgment to establish that there is no genuine issue for trial. Specific cost consequences automatically apply where a party seeking summary judgment does not succeed or where a party acted in bad faith or for the purpose of delay.

Rule 21 also provides a mechanism to summarily dispose of an action, either by having questions of law determined prior to trial or by striking out a pleading on the basis that it discloses no reasonable cause of action or defence.

The following four issues were identified during the consultation process:

i. Whether to change the "no genuine issue for trial" test, or broaden the power of a motions judge on a summary judgment motion, or both.

ii. Whether the presumptive cost sanctions arising from unsuccessful summary judgment motions should be eliminated.

iii. Whether a new summary trial mechanism ought to be introduced, similar to British Columbia's rule 18A.

iv. Whether rule 21 ought to be amended to make it more effective in appropriate cases.

Rule 20 (Summary Judgment) Test

Some suggested that the test of "no genuine issue for trial," or at least the court's interpretation of it, ought to be modified to fulfil the basic purpose of rule 20. It was also suggested that the powers of the court hearing a summary judgment motion ought to be expanded to permit greater scope for rule 20 motion judges and masters to grant summary judgment.

There was general agreement that rule 20 is not working as intended. Both lawyers and Superior Court judges said that the Court of Appeal's view of the scope of motion judges' authority is too narrow. Whether this view is correct can be debated. Whether it exists is beyond debate. The cost consequences from a failed summary judgment motion have also been said to be too onerous, deterring many litigants and their counsel from using rule 20.

The bar reported, and ministry statistics confirm, that few summary judgment motions are brought today.[24] A subcommittee of the Civil Rules Committee has proposed to replace the current "no genuine issue for trial" test to expand the application of rule 20. Several suggested that it is not the test itself, but the court's interpretation of it, that has limited rule 20's effectiveness. Both judges and lawyers noted that responding parties to a summary judgment motion may put facts in dispute if only to present the motion judge with an issue of credibility and to argue that, as a result, a trial is required. I was told that judges might be reluctant to grant summary judgment given the Court of Appeal decisions that say the court's role in determining such motions is narrowly defined.

A distinct minority did not think rule 20 needs any amendment. Some said it should remain a difficult threshold to meet and that the Court of Appeal has properly interpreted the test. The concern was that should the threshold test be set too low, many meritorious claims or defences might be unjustly disposed of too early by way of summary judgment orders. Any new test should not inhibit the ability of parties to successfully bring forward new causes of action or otherwise arrest the development of the common law.

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[24] In 2005-06, summary judgment motions were commenced in only 642 of Ontario's 63,251 Superior Court civil cases (1%).

Quite apart from whether any rule 20 change is made, there was a clear call during consultations for an expedited mechanism for the resolution of straightforward disputed facts, other than a full trial. This is the mini-trial option. The mini-trial, with *viva voce* evidence, would be heard by the same judge hearing the summary judgment motion. I note that rule 20.05 already allows for a "speedy trial" of an action, in whole or in part, where summary judgment is refused; however, the speedy trial provisions of rule 20 appear not to be used with any regularity.

No Canadian jurisdiction uses the test of "no real prospect of success" in its summary judgment rule, but it is used in the Civil Procedure Rules (rule 24.2) in England and Wales, which states:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if ---
>
> (a) it considers that ---
>
> i. the claimant has no real prospect of succeeding on the claim or issue; or
>
> ii. that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no compelling reason why the case or issue should be disposed of at a trial.

The courts in England have noted that while the test of "no real prospect of success at trial" can be stated simply, its application in practice is difficult.[25] Other

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[25] *Doncaster Pharmaceuticals Group Ltd and others v Bolton Pharmaceutical* Co 100 Ltd. [2006] EWCA Civ 661 at para. 5.

English appellate decisions appear to have limited the impact of the rule, for reasons similar to those of the Court of Appeal for Ontario.

Changing the test in rule 20 from "no genuine issue for trial" to "no real prospect of success at trial" would, in theory, reduce the threshold for granting summary judgment. At a minimum, it would signal a more liberal approach to summary judgment motions. Should a test of "no real prospect of success" be adopted in Ontario, it would attract judicial interpretation and case law from England and Wales would likely be relied upon to guide the court. The English case law suggests an interpretation of "no real prospect of success" that is equally restrictive, if not more restrictive than the current "no genuine issue for trial" test and the Court of Appeal's interpretation of it. Accordingly, it seems to me that changing the "no genuine issue for trial" test to "no real prospect of success at trial" may well not work, if the goal is to expand the scope of summary judgment.

Moreover, from my reading of the Court of Appeal's decisions on summary judgment, it is how the court has confined the scope of the powers of a motion judge or master under rule 20, not the "no genuine issue for trial" test itself, that has limited the effectiveness of the rule.

If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial.

As rule 20 matters now stand, the result of a rule 20 motion is binary: the motion is granted and the action ends, or it is dismissed and the parties are on the way to full trial. In my view, there should be more flexibility in the system. Where the court is unable to determine the motion without hearing *viva voce* evidence on discrete issues, the rules should provide for a mini-trial where witnesses can testify on these issues in a summary fashion, without having to wait for a full trial. This can be done in British Columbia through rule 18A. It could be done in Ontario through a similar rule, i.e., by amending rule 20.

As noted, at the conclusion of a summary judgment motion, subrule 20.05(1) already confers on the court the power to order matters to proceed to trial "forthwith" on a list of cases requiring speedy trial. In my view, amendments to rule 20 ought to be made to permit the court, as an alternative to dismissing a summary judgment motion, to direct a "mini-trial" on one or more discrete issues forthwith where the interests of justice require *viva voce* testimony to allow the court to dispose of the summary judgment motion. The same judge hearing the motion would preside over the mini-trial.

Presumptive Cost Sanctions in Unsuccessful Summary Judgment Motions

Rule 20.06 provides for substantial indemnity costs against a moving party who is unsuccessful in obtaining summary judgment. Where the moving party obtains no relief, the court shall fix the opposite party's costs on a substantial indemnity basis unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.[26] Substantial indemnity costs may also be imposed where the court finds that any party to a motion for summary judgment has acted in bad faith or primarily for the purpose of delay.[27] Given the potentially significant cost consequences of an unsuccessful summary judgment motion, there is a concern that rule 20 is not being used in cases where it ought to be.

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[26] Ontario Rules, r. 20.06(1).
[27] Ontario Rules, r. 20.06(2).

In New Brunswick, the Northwest Territories, Nunavut and Prince Edward Island, there is a presumption of substantial indemnity costs against an unsuccessful moving party similar to Ontario's.[28] No other Canadian jurisdiction has adopted a similar presumption.

Many of those consulted thought the presumption of substantial indemnity costs should be eliminated. It was seen to be a key deterrent to bringing a summary judgment motion. At the Advocates' Society Policy Forum the presumption of substantial indemnity costs was seen to be unfair.[29]

I think that there is merit in making it clear within rule 20 that substantial indemnity costs may be awarded by the court where it is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay. In light of the significant costs associated with summary judgment motions, there ought to be some clear deterrent within rule 20 itself for those who wish to use summary judgment as a litigation tactic or who wish to use rule 20 to unduly delay the final resolution of the case. However, substantial indemnity costs should not be presumptive. Motion judges, I think, will have little difficulty in deciding whether substantial indemnity costs are appropriate in the circumstances of the motion.

New Summary Trial Mechanism

In addition to summary judgment and the mini-trial option previously discussed, a summary trial rule such as British Columbia's Rule 18A may provide an effective tool for the final disposition of certain cases on affidavit and documentary evidence alone. A significant number of actions in that province are tried under that rule. Unless the Civil

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[28] New Brunswick Rules, r. 22.06(1); PEI Rules, r. 20.06(1); Rules of the Supreme Court of the Northwest Territories, Regulation 010-96, r. 180(1) [hereinafter NWT Rules].

[29] The Advocates' Society, *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, (The Advocates' Society: March 2006) at 9, online: The Advocates' Society <http://www.advocates.ca/pdf/Final_Report.pdf>.

Rules Committee concludes otherwise, I see no valid reason why Ontario should not import the text of British Columbia's rule 18A.

British Columbia's rule 18A allows a court to grant judgment in cases where there is an issue on the merits "unless the court is unable, on the whole of the evidence before it, to find the facts necessary to decide the issues of fact or law" or unless "the court is of the opinion that it would be unjust to decide the issues on the application."[30] Affidavit and other documentary evidence, including evidence taken on an examination for discovery and written statements of an expert's opinion, may be used. The court may, at a preliminary hearing for directions, order cross-examination on affidavit evidence "either before the court or before another person as the court directs."[31]

If the court is unable to grant judgment at the summary trial on the affidavit and documentary evidence alone, it may make a variety of orders to expedite the trial of the case (e.g., interlocutory applications to be brought within a fixed time, agreed statement of facts to be filed within a fixed time, a discovery plan with fixed timelines, and fixed duration of examinations for discovery).[32] The court also has the power to adjourn or dismiss the summary trial application, before or at the hearing of the application, where "the issues raised are not suitable for disposition under this rule" or "the summary trial will not assist the efficient resolution of the action."[33]

British Columbia's rule 18A has been very well received and is said to be successful. As noted by one commentator in British Columbia, "[N]ot since the introduction of the summary trial under rule 18A has such a versatile and useful tool been placed in the hands of litigators wishing to have a civil dispute of modest dimensions adjudicated in a speedy, comparatively inexpensive, yet just manner....When Rule 18A was first introduced, no one could have imagined the way, and the extent to which, it would change (for the good) the practice of civil litigation in the province."[34] Indeed, the British Columbia rule is being employed in 60% of cases; however, a similar rule in Alberta is not yet widely used.[35]

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[30] B.C. Supreme Court Rules, B.C. Reg. 221/90, r. 18A(11) [hereinafter, BC Rules].

[31] BC Rules, rule 18A(10).

[32] BC Rules, rule 18A(13).

[33] BC Rules, rule 18A(8).

Rule 18A was not an immediate success in British Columbia. When it was first introduced, it was designed to provide a motion judge with a mechanism to decide disputed questions of fact that would otherwise be an impediment to a successful summary judgment motion. Initially, there were a large number of rule 18A applications, which created delays. However, it now appears the benefits of the rule are being felt and there are no calls to reform it.[36]

Alberta also has a summary trial procedure,[37] which is largely based on British Columbia's rule 18A. Prince Edward Island and Saskatchewan have a summary trial procedure, although it is limited to actions governed by their simplified procedure as in Ontario under rule 76.[38] Manitoba does not have an express summary trial rule. However, where the court finds a genuine issue for trial on a summary judgment motion, the judge may, in his or her discretion, conduct a trial on affidavit evidence and grant judgment "unless the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the questions of fact or law, or it would be unjust to decide the issues on the motion."[39]

Summary trial mechanisms were recommended by the CBA Systems of Civil Justice Task Force and commented on with approval at the Advocates' Society's Policy Forum in March 2006. The benefits of adopting a new summary trial rule include:

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[34] Vancouver Bar Association, The Advocate (Volume 61, Part 2 (March 2003)) at 169-170.

[35] Alberta Law Reform Institute, "*Alberta Rules of Court Project - Summary Disposition of Actions,*" Consultation Memorandum 12.12, August 2004, Edmonton, Alberta, at 63.

[36] See comments of Madam Justice Koenigsberg, referenced in the Advocates' Society, *Final Report: Streamlining the Ontario Civil Justice System* (Toronto) pg. 6.

[37] Alberta Rules, r. 158.

[38] PEI Rules, r. 75.1.11; Saskatchewan Queens' Bench Rules, Part 40 [hereinafter Saskatchewan Rules].

[39] Manitoba Rules, r. 20.03(4).

- **Proportionality:** It would create a new mechanism for the final disposition of non-complex cases in a summary manner, where a full *viva voce* trial is not warranted given the amounts or issues at stake. If brief *viva voce* evidence on a discrete issue is required, the motion judge as trial judge can hear that evidence.

- **Delay and cost reduction:** Where appropriate, the court may finally dispose of a case early without the delay and costs associated with other pre-trial steps (e.g., motions, discoveries, mediation). If discoveries have been completed, the transcripts will be part of the evidentiary record.

- **Final early disposition, with a resulting decrease in the number of cases on trial lists:** Currently, where a summary judgment motion is unsuccessful, the case proceeds to trial. A summary trial would finally and quickly dispose of the action without a full trial. This will reduce the number of cases on the trial list. Judgments from summary trials would be final, subject to appeal.

- **Greater access for unrepresented litigants:** Since evidence will largely be by way of affidavit and other documentary evidence, unrepresented litigants will have a forum to resolve their case and have their "day in court," without the need to be trained in the complexities of trial processes and the applicable rules of evidence. Also, matters may be resolved earlier at a forum before a judicial officer, with corresponding savings in time that judges and opposing counsel might otherwise spend trying to accommodate unrepresented litigants in the steps leading up to trial.

- **Flexibility:** Certain cases may not be appropriate for a summary trial determination, and a full trial with *viva voce* evidence may be needed. The objective of this rule is not to eliminate trials. Any new rule should ensure access to a full trial where a case is not suitable for a summary trial determination.

Jurisprudence from B.C. and Alberta already exists as to when a case is appropriate for determination by way of summary trial, which will likely provide guidance to the Ontario courts.

Rule 21 (Determination of an Issue Before Trial)

Rule 21 provides a further mechanism to summarily dispose of an action either by having questions of law determined prior to trial or by striking out a pleading on the basis that it discloses no reasonable cause of action or defence. The test on a rule 21 motion is whether it is "plain and obvious" that the claim cannot succeed.

Two concerns were identified with respect to the operation of rule 21. The first is the apparent tendency of the court to repeatedly grant leave to amend pleadings, rather than to strike them in appropriate cases. The second is the "plain and obvious" test. Some suggested that this test be amended to make it easier for the court to strike pleadings at an early stage.

I am not persuaded that a change to the "plain and obvious" test under rule 21 is required. Rule 21 serves a different purpose than rule 20: its objective is to eliminate at the outset those cases where the claim or defence will fail because it discloses no recognized or accurately pleaded cause of action or defence. From an access to justice perspective, I am concerned about making it too easy to dispose of cases too early in the litigation process through a more lenient test.

The practical problem with rule 21 motions, it was said, is that the court tends to regularly permit litigants to amend pleadings, instead of striking the claim or defence. This may happen after repeated motions to strike before several judicial officials. In my view the solution is, where practicable, to have the same judicial officer who grants leave to amend a pleading preside over any subsequent rule 21 motions involving the same pleading.

Recommendations (Summary Disposition of Cases)

- **Do not amend the test of "no genuine issue for trial" in rule 20.**

- **Amend rule 20 to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed, including adverse inferences where a party fails to provide evidence of persons having personal knowledge of contested facts. This power, however, ought not to be exercised where the interests of justice require that the issue be determined at trial.**

- **Amend rule 20 to permit the court to direct a "mini-trial" on one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion. The same judicial official hearing the summary judgment motion would preside at the "mini-trial."**

- **Eliminate the presumption of substantial indemnity costs against an unsuccessful moving party in a summary judgment motion in rule 20.06. Replace it with a rule conferring permissive authority on the court to impose substantial indemnity costs where it is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay.**

- **Adopt a new summary trial mechanism, similar to rule 18A in British Columbia.**

- **Confer on a judge hearing a summary judgment motion the authority to convert an unsuccessful summary judgment motion to a summary trial application for cases appropriate for summary trial determination. The judge should also be vested with the necessary powers to make appropriate trial management orders so as to get the case ready for summary trial determination.**

- **Where practicable, the same judicial officer who grants leave to amend a pleading should preside over any subsequent rule 21 motions involving the same pleading.**

6. UNREPRESENTED LITIGANTS

Recent media articles and speeches by senior members of the judiciary have reported a growing incidence of unrepresented litigants in Ontario's civil justice system. This view was shared by many lawyers, judges and court administrators with whom I met during consultations. However, no formal study has been conducted on the number of unrepresented litigants, their socioeconomic profile, the nature of the legal problems they face and the gaps in serving them. I am advised that the Ministry of the Attorney General is undertaking efforts to collect statistics on the number of unrepresented civil litigants in Ontario courts.

During the course of this Review, I heard several explanations as to why there are more unrepresented litigants, assuming this to be true, such as: the rising cost of legal fees making representation out of reach for low and middle-class Ontarians; the prevalence of a "do-it-yourself" attitude among some litigants; and litigants seeking to pursue a claim or defence on their own, despite the advice of formerly retained counsel. I also heard from judges, lawyers and court administrators about the unique challenges and problems they face when dealing with a case involving unrepresented litigants.

Whatever the cause and impact of unrepresented litigants on the civil justice system may be, I am of the view that the civil justice system must exist to serve members of the public – whether represented or not. The solution, in my mind, is not to create additional barriers to inhibit or restrict access to the system. Rather, a reasonable modicum of resources and assistance ought to be made available to assist those with legal problems who cannot afford counsel or choose not to retain counsel, to permit them to more easily represent themselves in a system that can be foreign and complex for those without formal legal training. At a minimum, they should be able to obtain basic information about the civil justice system and early summary advice as to whether it makes sense to pursue or defend a case.

Assessment of Unrepresented Litigants' Needs

In at least four other Canadian jurisdictions (Alberta, British Columbia, Nova Scotia, Quebec), studies have been conducted on the needs of unrepresented litigants and how to meet them. Depending on the study, they provide information about the profile of unrepresented litigants, the nature of the legal problems they face or present to other users of the system, where gaps exist in legal services and how services may be improved.

In my view, a similar needs assessment ought to be conducted in Ontario. Information obtained would be invaluable in improving access to justice and developing a strategy to respond to the unrepresented. It would permit limited resources to be targeted to those areas where the greatest procedural, substantive or geographic needs have been identified, and make it possible to prioritize improvements accordingly. It would also shed light on the best means of making legal information and resources available and communicating their existence to the public.

In some instances, litigants need early advice on the substantive merits of a claim or defence. Such advice may inform a decision to pursue or defend an action. For others, minimal guidance and direction to appropriate resources may be all that is needed. Some may be able to pursue their case through the Small Claims Court without representation. In other, more complex matters before the Superior Court of Justice, the services of a lawyer may be required. The issue then is how to provide legal assistance that is responsive to litigants' needs and cost-effective in a civil justice system that must operate in a world of limited resources.

As matters now stand, limited help is available to those with civil legal problems who cannot afford a lawyer. With the exception of a very few civil legal aid certificates, Legal Aid Ontario does not provide assistance to litigants with civil disputes before Ontario's courts. In 2004, the *Solicitors Act* was amended to permit contingency fee arrangements in Ontario.[40] The contingency fee arrangement is used in almost all personal injury litigation. It has limited use in other litigation. The Law Society of Upper Canada, through the Lawyer Referral Service, will supply an applicant with the name of a lawyer who will provide up to a half hour free consultation in a specified area of the law. However, given the 30-minute time period, there are obvious limits on the benefits this commendable initiative may deliver.

Improving Information Resources for Civil Litigants

The Ministry of the Attorney General and the Court of Appeal have produced various resources and step-by-step guides to help litigants understand the processes and procedures in the Small Claims Court, the Superior Court of Justice and the Court of Appeal. The most helpful are the Small Claims Court Guides, which are available at court locations and on the ministry's website and provide step-by-step plain language explanations. The material relating to proceedings before the Superior Court of Justice and the Court of Appeal could benefit from additional detail and plain language, to better assist litigants. What is also missing is plain-language material for the public on the civil justice system generally and on substantive areas of the law that commonly affect unrepresented litigants. Moreover, the material that is available may not be accessible or its existence may not be well known to the general public. I accordingly recommend improvements in these areas.

Pro Bono Services

Other initiatives have been undertaken in recent years to respond to the plight of the unrepresented. Pro Bono Law Ontario (PBLO), a charitable organization that creates opportunities for lawyers to provide pro bono legal services to persons of limited means, was created in 2002. Since it opened, it has created approximately 30 pro bono projects in Ontario, with two projects targeted at assisting those with civil legal problems: the

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[40] R.S.O. 1990, c. S.15, s. 28.1.

Toronto Small Claims Court Pro Bono Duty Counsel Project, and the Appeals Assistance Project in the Divisional Court and Court of Appeal. Both connect volunteer pro bono lawyers with litigants of limited means in those courts.

Many lawyers have also responded to the call. Either through participation in formal pro bono projects or through individual representation on pro bono files, it appears to me that lawyers and law firms are providing more pro bono services than they have in the past. I note, however, that not all Ontario lawyers can afford to take on pro bono files. It is a financial reality that the larger Toronto firms can better afford to offer pro bono services. This may well make the firm more marketable to articling students and younger lawyers who want an opportunity for first-hand experience in having carriage of an action or defence. In smaller communities, lawyers provide assistance to those who cannot afford the full cost of legal services. As one lawyer from a smaller Ontario community said: "I already do a lot of pro bono work. It's called my accounts receivable." And according to a 2005 *Canadian Lawyer* survey, more lawyers are adopting innovative billing structures, such as contingency, flat fees and sliding scale fees.[41]

I agree that pro bono services cannot adequately respond to all of the needs of unrepresented litigants. I do not think that imposing mandatory pro bono quotas or greater regulation of fees charged by lawyers is the solution. Market forces and the lawyers' sense of public duty will drive the amount of pro bono services that any one lawyer can offer and the fees he or she may charge. A recommendation to regulate these areas would have a chilling effect on the spirit of volunteerism that appears to be growing among the bar. I prefer to leave it to the Law Society of Upper Canada to examine these issues, should it see fit to do so. However, I encourage Ontario lawyers to continue to offer pro bono services and innovative billing options to enhance access to justice.

On the subject of legal aid in civil cases, there has been a healthy debate on the extent to which parties to a private civil dispute should be entitled to a government

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[41] Kirsten McMahon, "The Going Rate 2005" *Canadian Lawyer* (June 2005) at 25.

(publicly) funded lawyer. In his 1997 *Report of the Ontario Legal Aid Review*, Professor John McCamus noted that there is a range of civil matters for which legal aid certificates were historically granted, but are no longer available. He found that "certificate coverage has been eliminated for most civil law matters," and made various recommendations for improved civil legal aid funding.

In September 2006, the Attorney General announced that an update of Professor McCamus' 1997 report will be undertaken. To avoid the potential for competing recommendations, it would not be appropriate for me to make specific recommendations with respect to civil legal aid funding. As a general finding, however, it is clear to me that the needs of the unrepresented should not and cannot be met by the spirit of volunteerism of the Ontario bar alone.

A Model for a Self-Help Centre

I think that meaningful immediate and direct assistance can be achieved by the creation of a civil law self-help centre. Self-help centres exist in many American jurisdictions, reportedly with much success. In Canada, civil self-help centres have been established in British Columbia, Quebec and Alberta. Ontario has adopted a self-help centre model for family litigants, known as Family Law Information Centres (FLICs).

The components of a given self-help centre may vary. It may provide services in a physical location at or near a courthouse, from a mobile unit or through a virtual location on the Internet – or a mix of these models. Services offered may include basic legal information and resources, referrals to other agencies, assistance with completion of forms, and summary legal advice by a staff or volunteer lawyer.

For example, the British Columbia model provides on-line, video and print resources, including self-help packages and forms; connects people with courthouse librarians to assist with legal resources; and provides information about alternative dispute resolution. The centre also provides information about what to expect when going to court, and directs people to free courses on court processes and procedures. In British Columbia, free legal advice is available through the telephone system LawLINE and a pro bono legal advice clinic. Members of the public must meet financial eligibility criteria to qualify for one of these free legal services. An evaluation in August 2006 found that "the Centre was providing a unique set of self-help services and was forming part of a larger context of emerging services for unrepresented litigants. Users reported the Centre as largely effective in satisfying their needs and in helping them prepare for court."[42] It is funded by the British Columbia Ministry of the Attorney General.

PBLO has developed a model for a new civil law self-help centre, to be piloted in Toronto. Based on its experience, PBLO has found that – short of full representation being made available – unrepresented litigants require: assistance with pre-trial services (basic procedural information, help with completion of forms, summary advice that focuses on identification of legal issues and assessment of legal merits), trial services (representation) and post-trial services (information on enforcement and compliance).

With assistance from the Advocates' Society and the Ministry of the Attorney General's Pro Bono Task Force, PBLO has proposed a self-help centre at Toronto's Superior Court of Justice that would be staffed by a full-time, non-lawyer facilitator and a part-time staff lawyer. The proposed self-help centre would provide:

- ☐ Clear-language information and instruction on various Superior Court procedures, including enforcement and compliance (e.g., information kits on motions). The Ministry of the Attorney General's Pro Bono Task Force has agreed to assist in preparing plain language information material and resources.

- ☐ Referral information to existing programs and services (e.g., mediation).

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[42] John Malcolmson, Gayla Reid, *BC Supreme Court Self-Help Information Centre Final Evaluation Report* (Law Courts Education Society of BC: August 2006) [unpublished] at 8, online: <http://www.lawcourtsed.ca/documents/Research/SHC_Final_Evaluation_Sept2006.pdf>.

- ☐ Assistance with completion of forms through the use of lawyer volunteers, online document assembly software or a combination of both.

- ☐ Summary advice and duty counsel services by volunteer lawyers, focusing on identification of legal issues and assessment of legal merits.

- ☐ Representation at hearings and settlement conferences by volunteer lawyers.

PBLO estimates the cost of the self-help centre to be approximately $235,000 for the initial start-up and the first year of operation. No funding source has been secured for the self-help centre pilot project.

Based on the success of self-help centres elsewhere and their growing use in jurisdictions throughout Canada, PBLO's self-help centre pilot project in Toronto would appear to be part of a practical and cost-effective solution to improving access to justice for those who cannot afford a lawyer.

During consultations, judges, lawyers, court staff and unrepresented litigants have all identified the need for basic plain-language procedural information, summary legal information and advice, and the ability to refer unrepresented litigants to other information sources and services as needed. The self-help centre would provide this support. Since not all persons with legal problems will require full representation, the self-help centre can offer assistance and advice proportionate to user needs. In many instances, early assistance by the staff facilitator or a volunteer lawyer will reduce inconvenience and frustration and potentially avoid the costs of litigation altogether. With online access, it is hoped that those outside Toronto will also be able to benefit from the centre's services. Furthermore, as a pilot, its success can be evaluated to allow improvements to be made prior to any expansion elsewhere in the province.

Recommendations (Unrepresented Litigants)

☐ Undertake an independent needs assessment study, guided by a steering committee of civil legal service providers and chaired by PBLO. Funding from possible sources, such as The Law Foundation and the Ministry of the Attorney General ("MAG") should be explored. The objectives of the study should be to:

- a) Develop a profile of civil unrepresented litigants in Ontario and their points of interaction with the civil justice system that give rise to difficulties for unrepresented litigants themselves, court administrators and the courts;
- b) Determine the legal needs of unrepresented civil litigants, the scope and accessibility of existing legal services and where additional legal services may be provided to fill service gaps, geographically and in substantive civil practice areas; and
- c) Recommend the most cost-efficient and -effective means of providing legal information and assistance.

☐ A committee of providers of legal information and resources (MAG, PBLO, Law Society of Upper Canada, Legal Aid), chaired by PBLO, should meet to coordinate the delivery of improved legal information and resources in the following four areas:

- a) General information about the civil justice system and its structure;
- b) Step-by-step procedural information to assist unrepresented litigants;
- c) Summaries of substantive areas of the law that would be of greatest assistance to most unrepresented litigants in civil proceedings;
- d) Procedural information on enforcement and compliance with court orders.

- **The committee should consider the most effective and accessible media for communicating this information to the public (e.g., printed material available at courts or community legal clinics; electronically through the Internet; or videotaped displays of court processes and acceptable court conduct).**

- **Bar associations and civil litigators should continue to implement and offer pro bono services and programs where possible.**

- **Ontario lawyers should be encouraged to consider new and innovative billing methods that promote access to justice for litigants with civil legal issues who would not otherwise be able to afford counsel.**

- **As part of the review of legal aid announced in 2006, the 1997 McCamus recommendations with respect to civil legal aid should be revisited.**

- **PBLO's efforts to develop a civil law self-help pilot project in Toronto should continue to be assisted by the Ministry of the Attorney General's Pro Bono Task Force. Funding from possible sources, such as The Law Foundation and MAG, should be explored. Expansion of the pilot project to other regions of the province should be considered pending an evaluation of its success, and after considering cost-effective service delivery options that are responsive to the needs of those who would otherwise be unable to access legal representation.**

7. CIVIL JURIES

The issue whether there should be any change that would affect a party's right to a jury trial was controversial. Some advocated no change. Others, mainly judges, advocated the abolition of civil juries. From the standpoint of the personal injury bar, access to a jury trial is a unifying issue as both the plaintiff and defence sides want access to civil jury trials preserved.

In 2005 –2006, there were 6,839 civil trials heard.[43] Of these trials heard, 1,598 or 23% were jury trials. The vast majority of these jury trials involved litigation arising from motor vehicle accidents (1,186 or 74% of civil jury trials heard).

Although there is some opinion to the contrary, based on my experience and that of others, I think it is clear that most (not all) civil jury trials take longer than the same trial would have taken before a judge sitting without a jury. The offset is that the rate of settlement for civil jury trials is higher than for non-jury trials.

On balance, I am not satisfied that a sufficiently strong case has been made to recommend that civil jury trials be abolished or available only on motion in specified circumstances. I recognize the unfortunate reality that insurers in most negligence actions require their counsel to deliver a jury notice. I refer to this as "unfortunate" because one clear aim of the strategy is to increase the risk to which the plaintiff is exposed, manifestly on the basis that the insurer can absorb the risk better than almost all plaintiffs.

I do, however, think that some limitations on the statutory right to a jury trial should be imposed for at least some simplified procedure (rule 76) trials. I reach that conclusion for two general reasons. First, there is the matter of institutional resources: jury panels have to be secured, jurors accommodated etc. Frequently, a relatively large panel has to be assembled for jury trials that typically settle shortly before trial. Second, there is the matter of juror inconvenience. I have been told that some jurors have raised the issue whether their civil duty should be engaged where the issue is whether the defendant should pay the plaintiff $12,000. Even if that question has not been asked, it should be addressed.

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[43] Note that a "trial heard" represents a day when a trial is being heard. Also, many trials that have commenced, may settle. Therefore, this figure does not represent the total number of trials that were commenced or trials that were commenced and completed. See *Civil & Small Claims Court Statistics 2005-06, supra* note 10 at 47.

In my view, in simplified rules cases where the claim is $50,000 or less, there should be no right to a jury, except on motion. For purposes of the motion, I think that there should be some broad public interest component in the action before an order is made for a jury trial.

I would exempt the common law actions for defamation, malicious prosecution and false imprisonment, where there is a strong historical right to a jury in a case engaging community values. I considered but rejected the idea of requiring the party seeking a jury to, in effect, pay for the right as occurs in British Columbia.

In the section on Simplified Procedure I have recommended raising the simplified rules monetary limit to $100,000. If this is done, the existing access to a jury trial would apply to larger simplified rules claims – in the $50,001-100,000 range.

The trial judge is in the best position to determine whether the jury understands and is capable of understanding the essential issues in the action. Trial judges ought to be able to dispense with the jury, on the trial judge's own motion. The views of counsel should, of course, be received and considered. I think that it would be a rare case where the trial judge would discharge a jury when both the plaintiff and defendant oppose taking that step.

Recommendations (Civil Juries)

- ☐ **The current regime governing the availability of civil juries set out in the *Courts of Justice Act* should be retained, except for simplified rule actions under rule 76 in which $50,000 or less is claimed. In those cases a party must obtain an order, on motion, to obtain a jury based on broad public interest grounds.**

- ☐ **The *Courts of Justice Act* should be amended to permit the court to dispense with a jury on its own motion. It should prescribe the following test to be applied by the court when deciding whether or not to strike a jury notice:**

  a) Whether justice will be served better with or without a jury, after considering all relevant factors, including the facts of the case, the technical nature of the evidence, the complexity or uncertainty of the relevant law, the predominance of substantive legal issues over factual issues, the interwoven issues of fact and law, and counsels' positions;

  b) Whether a party would be able to obtain a fair trial before a jury;

  c) Whether jury service would be an unwarranted inconvenience to jurors, considering the value, nature and importance of the matters, the parties' interests in a jury trial, and the likely duration of the trial; and

  d) Where, in the opinion of the court, inflammatory conduct by a party or counsel or inadmissible evidence has been placed before the jury.

8. DISCOVERY

In 2003, the Task Force on the Discovery Process in Ontario ("Discovery Task Force") delivered recommendations on how Ontario's civil discovery process may be improved.[44] It made recommendations on two fronts: (1) the development of best practices to promote among lawyers a broader acceptance of the value of collaboration and a better appreciation for cost-effective and efficient ways to conduct discovery; and (2) amendments to the Rules of Civil Procedure, including a narrower scope of discovery and default time limits on oral discovery. Few of the recommended amendments have been incorporated into the Rules of Civil Procedure.

The development of best practices was proposed in recognition of the fact that many problems with the discovery process arise from a culture of litigation that rule amendments would not be able to remedy. In its Supplemental Report the Discovery Task Force released best practices or guidelines for the conduct of discovery generally, as well as specific guidelines relating to the disclosure and production of electronic documents, discussed in greater detail below.

A conclusion reached by the task force, which I also reached during this Review, is that discovery problems do not exist everywhere in the province. They were found to arise primarily in larger, complex cases and most frequently in large urban centres such as Toronto. They rarely exist in smaller communities where the bar enjoys a spirit of collegiality and cooperation. In making my recommendations below, this reality of civil litigation in Ontario was duly considered.

Review consultations and the commendable work of the Discovery Task Force identified the following issues:

i. Whether to narrow the scope of discovery.

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[44] *Discovery Task Force Report, supra* note 3.

ii. Whether the duration of oral examinations for discovery should be limited.

iii. Whether refusals based on relevance at an examination for discovery should be permitted.

iv. How best to deal with the discovery and production of electronic documents.

v. Whether discovery planning should be a requirement under the rules to promote more efficient discovery management.

Scope of Discovery

The scope of documentary discovery, as established in rule 30.02, encompasses "every document *relating to* any matter in issue in an action." This has widely been interpreted in case law to require production if a document has a "semblance of relevance."[45] Similarly, rule 31.06 requires a person being examined for discovery to answer "any proper question *relating to* any matter in issue in the action." The "semblance of relevance" test applies to discovery questions, in the same way as it applies to production. Relevance under these rules is a much broader and looser test than is applicable at trial, and has led some to observe that "trial by ambush," the original concern, has been replaced by "trial by avalanche."

During consultations, the vast majority of those consulted agreed that the scope of discovery ought to be restricted and replaced with a simple test of "relevance." Indeed, this was the recommendation of the Discovery Task Force. The task force recognized that this change may lead to further motion activity and judicial interpretations of "relevant," and that any change is unlikely to end the debate over the proper scope of discovery. Nevertheless, it said a narrower test is required to help curb discovery abuse.

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[45] See, e.g., *Kay v. Posluns* (1989), 71 O.R. (2nd) 238 (H.C.). Interestingly, the broad "semblance of relevance" test appears to have originated from the British *Peruvian Guano* case, where the court rules that one must disclose every document that contains information that may, directly or indirectly, enable a party to advance his or her own case or to damage the opposing party's case. This includes documents that may fairly lead to a train of inquiry that would advance a party's own case or damage the case of the opposing party. See *The Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano* (1882), 11 Q.B.D. 55 (C.A.) at 63. However, the *Peruvian Guano* approach in England and Wales has been replaced with a more restrictive test for the disclosure of documents: See UK Civil Procedure Rules, r. 31.6.

I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with due regard to cost and efficiency."[46] In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.

This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.

Duration of Oral Discovery

A variety of factors contribute to unduly long examinations for discovery, including lack of preparation or experience on the part of counsel, irrelevant or repetitious questions or, in some cases, lawyers' billing targets. The Discovery Task Force referred to "numerous scenarios in which individual or small business litigants were forced to abandon claims or accept less than adequate settlements as a result of excessive discovery costs."[47]

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[46] *Discovery Task Force Report, supra* note 3 at 92.

[47] *Ibid.* at 57.

Many with whom I met expressed similar concerns about oral discoveries being fishing expeditions, unfocused or conducted by poorly prepared counsel who are unduly concerned about overlooking potential facts and issues. A few also noted lawyers' self-interest in prolonging examinations to achieve billing targets. As I have suggested, prolonged oral discoveries did not appear to be a problem in smaller Ontario communities.

However, what was consistent among the views I heard was that a default of one day (or seven hours) of examination per party is sufficient in most cases. I emphasize that the one-day limit should be a default time. There will be cases where more than one day will be required. The one-day default rule ought to permit parties to agree to more than one day for discoveries. Failing agreement, the court would determine the discovery time allocation.

In my view, this approach responds to concerns about unduly long and costly discoveries. It places reasonable limits on their duration for the typical case, and permits flexibility as needed for more complex cases. I recognize that this reform has the potential to generate motions seeking orders for more than one day of oral discovery. However, in most cases, counsel acting reasonably and having considered the cost of discovery and the importance, nature and value of the claim should be able to agree as to whether or not more than one day is needed. I would hope it would be in the rarest of cases that counsel would require the assistance of the court in determining the appropriate duration of examinations.

Refusals Based on Relevance

It was proposed that the rules should be amended to require parties to answer all questions at an examination for discovery, regardless of whether there is an objection on the basis of relevance. The only permissible objection would be on the basis of privilege, although some would add an "egregiously irrelevant" exception. In this model, any objections on the basis of relevance would be noted by counsel during the examination and recorded in the transcript, but the party being examined would be required to answer the question. The trial judge would determine its relevance and admissibility, where required. This is the approach currently in place under the U.S. Federal Rules of Civil Procedure (rule 30(d)).

Although this reform is attractive in some respects, it has the clear potential for adding costs. It would also tend to broaden the scope of discovery, inconsistent with my recommendation to narrow its scope to that information which is "relevant." Parties would be required to answer questions that are only marginally relevant and, even worse, questions that are entirely irrelevant.

Moreover, there does not appear to be a significant call for reform in this area, except perhaps in some complex cases or in larger urban centres. I am reluctant to recommend a reform that will apply to all cases when the problem is experienced in a few. Instead, as observed by the Discovery Task Force, I would encourage parties, in cases where the scope of what is "relevant" is murky, to voluntarily answer such questions and note on the record the objection to the question on the basis of relevance. This process is already permitted under rule 34.12(2), which reads:

> A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at the hearing.

Accordingly, I do not recommend the adoption of a new rule that would require parties to answer questions objected to on the basis of relevance.

Discovery and Production of Electronic Documents

Discovery and production of electronically stored information (generally referred to as electronic discovery or "e-discovery") is an issue that poses new problems and complications for litigants, their counsel and the judiciary. It is not an issue that is confined to large litigation files. Useful work in this area has been done by Justice Campbell and his e-discovery subcommittee.

Under the rules, litigants have an obligation to disclose all "documents" relating to the matters in issue. The rules have defined "document" broadly to include "data and information stored in electronic form."

There are four key issues relating to e-discovery:

- **Scope of electronic documents:** When fulfilling an obligation to search and disclose documents, to what extent must a party search for and disclose information found in all electronic sources (e.g., computer hard drives, floppy disks, CDs, back-up tapes, BlackBerries)?

- **Preservation of electronic documents:** What measures should parties involved in litigation, or imminent litigation, follow to ensure that all relevant electronic data is preserved to avoid subsequent potential tort litigation?

- **Review of electronic documents:** What procedures should be adopted to review, efficiently and cost-effectively, electronic documents to determine which documents are relevant and which are not?

- **Production of documents in electronic form:** Under what circumstances should parties produce documents electronically (rather than in hard copy)? In what electronic format should they be produced? Should documents in hard copy be produced electronically?

In 2005, the Discovery Task Force released its Supplemental Report, which included E-Discovery Guidelines.[48] Rather than amendments to the Rules of Civil Procedure, the task force proffered guidelines in recognition of the fact that the culture of litigation was not yet ready for rules to mandate e-discovery. Instead, the guidelines set out a number of principles with commentary intended to guide lawyers, clients and the judiciary through the e-discovery process.

In 2007, Justice Campbell coordinated a national committee to establish e-discovery guidelines for all Canadian jurisdictions, based on national guidelines developed by The Sedona Conference® in the United States. National e-discovery guidelines for Canada were sought because commercial and class action proceedings are often multi-jurisdictional, and e-discovery practices may well inform business practices (including document retention policies) of national corporations.

A first draft of *The Sedona Canada Principles* has been prepared.[49] The draft provides a set of principles for e-discovery with practical commentary. All of this is said, I think correctly, to be compatible with discovery rules in all Canadian jurisdictions. The draft draws heavily upon the Discovery Task Force's E-Discovery Guidelines.

Examples of the key principles and practices recommended in *The Sedona Canada Principles* include the following:

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[48] Found in Task Force on the Discovery Process in Ontario, *Supplemental Report* (Toronto: Task Force on the Discovery Process in Ontario, 2005), accessible online at: Ontario Bar Association Discovery Task Force E-Discovery Guidelines and Resource Page <http://www.oba.org/en/main/ediscovery_en/default.aspx>.

[49] The Sedona Conference®, *The Sedona Canada Principles: Addressing Electronic Document Production* (February 2007 Public Comment Draft), online at: The Sedona Conference, http://www.thesedonaconference.org/dltForm?did=2_07WG7pubcomment.pdf.

- Parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, (ii) the relevance of the available electronically stored information, (iii) its importance to the court's adjudication in a given case, and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

- Counsel and parties should meet and confer as soon as practicable and on an ongoing basis regarding the identification, preservation, collection, review and production of electronically stored information.

- The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.

- Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced.

I am not inclined to recommend a series of rules to deal with e-discovery issues. To do so would impose on every case mandatory e-discovery obligations that may not be necessary or sufficiently flexible to suit the needs of different cases. It may also be too soon in Ontario's litigation culture to introduce such a reform.

Instead, I would encourage greater use and reliance upon the E-Discovery Guidelines and *The Sedona Canada Principles*. *The Sedona Canada Principles* and accompanying commentary may be more effective than rules. They reflect the value of proportionality, flexibility and cooperation among parties in the context of e-discovery. These are central themes in this Review. They provide assistance to counsel on what issues should be considered. What is crucial is that parties consider e-discovery issues and tailor discovery plans and agreements to meet the needs of their case. At least for now, this is a better approach than having rule-based protocols that would be applicable in all cases.

However e-discovery issues are addressed, it is clear that lawyers and judges can no longer turn a blind eye to e-discovery, which can have a significant impact on the cost of litigation and its timely resolution.

I believe it would help if reliance on the E-Discovery Guidelines and *The Sedona Canada Principles* were encouraged through a Practice Direction. This would state that the court may refuse to grant discovery relief or may make appropriate cost awards on a discovery motion where parties have failed to consider and, to the extent reasonable, apply the E-Discovery Guidelines and *The Sedona Canada Principles* – in particular the requirement to meet and confer on the identification, preservation, collection, review and production of electronically stored information.

In the longer term, the Civil Rules Committee might consider ways to more fully incorporate e-discovery concepts into the Rules of Civil Procedure. This should only occur, in my view, after the profession has had time to familiarize itself with the E-Discovery Guidelines and *The Sedona Canada Principles.*

Discovery Planning

One proposal that I received was to amend the rules to require parties to agree upon a discovery plan early in the litigation process. The objective of a discovery plan would be to reduce or eliminate discovery-related problems by encouraging parties to reach an understanding early in the litigation process, on their own or with the assistance of the court if needed, on all aspects of discovery.

During consultations, the need for such a rule amendment was questioned, given the time and cost associated with formalizing a discovery plan, especially in cases where parties do not have discovery problems. I do note, however, that this reform is in place in several American jurisdictions (Texas, New York, Arizona).

In my view, parties should be encouraged to discuss early in the litigation how discovery will unfold, when and how production will occur and when oral discoveries will take place. It would be prudent to document areas of agreement and disagreement, if any. Early discovery/production planning will reduce costs in the long run.

A Practice Direction to promote discovery planning should also be considered, along the lines suggested above regarding e-discovery. It would state that the court may refuse to grant discovery relief or may make appropriate cost awards on a discovery motion where parties have failed to produce a written discovery plan addressing the most expeditious and cost-effective means to complete the discovery process proportionate to the needs of the case, including:

a) The scope of documents to be preserved;

b) The issue of proportionality (i.e., the scope of discoverable documents and the associated costs of searches and production, balanced with the discovery-related needs of the case)

c) Dates for the exchange of sworn affidavits of documents;

d) Number of experts and timing of delivery of expert reports;

e) Time, cost, and manner of production of documents from the parties and any third parties who may have relevant documents; and

f) Names of individuals proposed for oral discovery and the expected date and duration of examinations, along with any agreement to examine a party for more than one day.

Recommendations (Discovery)

- **The phrase "relating to any matter in issue in the action" should be replaced with "relevant to any matter in issue in the action" in all rules relating to discovery. The**

effect of this recommendation is to discard the "semblance of relevance" test and replace it with a simple relevance test.

- **Amend rule 31 to provide that each party have up to a maximum of one day (seven hours) to examine parties adverse in interest, subject to agreement otherwise or a court order.**

- **As a best practice, encourage parties to voluntarily answer questions at an examination for discovery that are objected to on the basis of relevance, as permitted under rule 34.12(2). In addition, encourage the court to consider the availability of the process in rule 34.12(2) when making the appropriate cost awards on refusals motions.**

- **The Office of the Chief Justice of the Superior Court of Justice should consider issuing a Practice Direction that would state the court may refuse to grant any discovery relief, or may make appropriate cost awards on a discovery motion, where parties have failed to:**

  1. **Consider and, to the extent reasonable, apply the E-Discovery Guidelines and *The Sedona Canada Principles*, in particular, the requirement to meet and confer regarding the identification, preservation, collection, review and production of electronically stored information;**
  2. **Develop a written discovery plan addressing the most expeditious and cost-effective means of completing the discovery process in a manner that is proportionate to the needs of the action, including:**
     a) **The scope of documents to be preserved as determined by both relevance and application of the principle of proportionality (in the context of the costs associated with document searches and production being balanced with the needs of the particular case);**
     b) **Dates for the exchange of sworn affidavits of documents;**

c) Number of experts and timing of delivery of expert reports;

d) Time, cost and manner of production of documents from the parties and any third parties who may have relevant documents; and

e) Names of those to be produced for oral discovery (an issue which may be relevant if a party is a corporation) and the dates and length of examinations.

9. EXPERT EVIDENCE

There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it.

During the consultation phase of this Review, I heard that s. 12 of the *Evidence Act*, which limits the number of experts "either side" may call to three, subject to leave of the presiding judge to call more, should be consistently enforced. I also heard that s. 12 should be repealed because trial judges never apply it. I think it is safe to say that most trial judges do not raise s. 12 on their own motion and most counsel seem to accept that in some cases more than three experts will be required.

Personal injury trials provide a useful example. In those actions it is frequently necessary to call more than three doctors. In addition, actuarial evidence is often required where there are future loss claims. Many personal injury claims raise "level of care" and more general "future care" cost issues. It is difficult to contemplate a serious personal injury case being presented (or defended) without more than three expert witnesses.

At the 2006 Advocates' Society Policy Forum on *Streamlining the Civil Justice System*, the expert evidence working group concluded that the proliferation of experts, expert bias and lengthy and uncontrolled expert testimony are major problems in Ontario.[50] Concerns were also raised about the absence of any rule requiring a meeting of opposing experts to seek to narrow disputed issues prior to trial so as to encourage settlement.

The Discovery Task Force in its 2003 report made the following three findings with respect to expert evidence:

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[50] Advocates' Society, *Streamlining the Ontario Civil Justice System, supra* note 4 at 13 – 14.

- ❑ Expert reports are not produced on a timely basis. Many lawyers mistakenly assume experts can easily complete reports within the 90/60/30 days prescribed by the rules, but experts are rarely able to provide reports, particularly reply reports, within short time periods. As a result, the court often adjourns trials. This leads to additional costs and trial delays.
- ❑ There has been a proliferation of expert reports. The culture of litigation has resulted in an "industry" of competing experts, which unduly increases costs.
- ❑ Parties do not have an opportunity to question experts about their reports prior to trial.

In his 1996 report, Lord Woolf recommended wide-sweeping civil justice reforms for England and Wales.[51] His recommendations relating to expert evidence have largely been implemented in the Civil Procedure Rules in the United Kingdom. The key reforms include the following:

- ❑ Experts have a duty to the court, which overrides any obligation to the person from whom the expert has received instructions or payment.[52] Experts must certify, at the end of the expert report, that they understand and have complied with their duty to the court.[53]
- ❑ The rules contain an express statement that expert evidence "is to be restricted to that which is reasonably required to resolve the proceedings."[54]
- ❑ No party may call an expert or put an expert's report in evidence without the court's permission.[55] Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that only one expert give evidence on that

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[51] Rt. Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Department of Constitutional Affairs, UK: July 1996) online: Department of Constitutional Affairs <http://www.dca.gov.uk/civil/final/index.htm>. See recommendations 156- 173 dealing with expert evidence.
[52] Civil Procedure Rules, SI 1998 No. 3132 (as amended), r. 35.3 [hereinafter UK Rules].
[53] UK Rules, r. 35.10.
[54] UK Rules, r. 35.1.
[55] UK Rules, r. 35.4.

issue. Where parties cannot agree, the court may select an expert from a list mutually provided by the parties or elsewhere.[56]

- Where there is a single joint expert, each party may give instructions to the expert and the court may give directions about the payment of expert's fees and expenses.[57]
- At any stage, the court may direct a discussion between experts for the purpose of reaching an agreed opinion on issues, or for preparation of a statement on those issues where they agree and disagree, along with their reasons for disagreeing.[58]

Similar reforms were introduced in 2004 in Queensland, Australia.[59] Their objective is to ensure a single expert gives evidence, to avoid unnecessary costs associated with the parties retaining different experts and to allow for more than one expert only if necessary to ensure a fair trial.

Three primary issues relating to expert evidence have been identified as requiring consideration:

i. Whether new mechanisms should be introduced to control the proliferation of experts and expert bias.

ii. Whether the time for delivery of expert reports should be altered.

iii. Whether there should be greater disclosure of the information on which an expert's opinion is based.

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[56] UK rules, r. 35.7.
[57] UK rules, r. 35.8.
[58] UK rules, r. 35.12.
[59] Queensland, Australia, Uniform Civil Procedure Amendment Rule (No. 1) 2004, section 7, Part 5 – Expert Evidence, online: Queensland Legislation <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

Proliferation and Bias of Experts

Consistent with the views of the CBA Task Force on Systems of Civil Justice, the Discovery Task Force and the Advocates' Society Policy Forum, the vast majority of those consulted in the course of this Review identified the proliferation of experts as a significant problem that often leads to a battle of competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources.

There is also the issue of partiality. A common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs. I know that this problem exists, but I hasten to add that not all experts should be tarred with the same brush.

As suggested above, numerous initiatives have been undertaken to improve the expert evidence process in recent years. The 2006 Advocates' Society Policy Forum included an expert-evidence working group that recommended a rule requiring opposing experts to meet before trial to narrow disputed issues. In 2003, the Discovery Task Force made recommendations in the context of the discovery process to adjust timelines regarding expert reports. The task force called for the establishment of best practices for the use of experts and their reports. It also said that consideration should be given to allowing limited examination for discovery of experts before trial, on the expert's consent or by order of the court. In addition, recent reforms regarding experts have occurred in both the United Kingdom and Australia with the goal of reducing costs by moving to a single-expert model. This model would permit multiple experts only if necessary to ensure a fair trial.

In my view, the increasingly popular single-expert model is a good idea that will not work in practice in too many cases. Frequently, the parties have different views on the factual foundation on which the expert's report will be based. There are, however, cases that cry out for a single expert. For example, I think of actuarial evidence in personal injury cases where the core "blank" to be filled in is the present value of the loss of $1,000 per year calculated using a discount rate of X%.

I support a system where a particular case or issue that requires expert evidence can be accommodated by a single expert. However, I do not think that should be the rule. Deciding whether to go with a single expert is a matter best left to counsel to determine on a case-by-case basis. For those relatively few cases that get to trial, I think trial judges can sort out those matters where experts were retained unnecessarily when costs are dealt with.

In some jurisdictions that have explored or implemented the single-expert model, some reservations have been expressed. The Alberta Law Institute, in its 2003 consultation memorandum, suggested that choosing and instructing a joint expert could cause delay, result in numerous court applications and likely cause more problems than it would solve.[60]

There are also mixed reviews from England and Wales about the effectiveness of the single joint expert rule. The reform is said to have been successful "in terms of proportionality, costs, and driving out the 'hired gun' experts."[61] However, it is not clear that it has had the effect of reducing costs, since some parties are still retaining their own "shadow expert" to opine on the joint expert's report.[62] This inevitably results in additional costs. Moreover, there appears to be case law at the appellate level resulting from the single expert model. The instructions to be given to the joint expert and the desire of one party to appoint an additional expert are areas of concern in England and Wales.[63]

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[60] Alberta Law Reform Institute, *Expert Evidence and "independent" Medical Examinations* (Consultation Memorandum No. 12.3) (Edmonton: ALRI, 2003) at 23.

[61] Robert Musgrove, *Lord Woolf's Reforms of Civil Justice: The Reforms, their Impact, and the future for civil justice reform in England and Wales*, Address to Advocates' Society Policy Forum (Toronto: March 9, 2006).

[62] U.K., Department of Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001), http://www.dca.gov.uk/civil/emerge/emerge.htm, at paras 4.21 – 4.26.

British Columbia's Civil Justice Reform Working Group considered, but did not recommend, mandatory single joint experts in all cases.[64] Instead, it recommended that a case planning judge give directions in appropriate cases as to whether parties must use a single joint expert on a given issue.[65] Similarly, the Discovery Task Force did not recommend single joint experts in all cases. However, its Supplemental Report does include a best practice that encourages lawyers to discuss the possibility of jointly retaining a single expert to reduce costs and avoid the possibility of competing expert evidence.[66]

Lastly on the single-expert issue, I note that rule 52.03 already permits a judge, on motion by a party or on the court's own initiative, to appoint an expert to inquire into and report on any relevant questions of fact or opinion. However, it appears this rule is rarely used.

Section 12 of the *Evidence Act* limits the number of experts that either party may call to three, unless leave of the judge is obtained. It reads:

> Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

Two other Canadian jurisdictions restrict the number of experts to three, unless leave of the court is obtained (Manitoba, New Brunswick).[67] Alberta does not permit more than one expert on any one subject on behalf of a party, except with leave of the court.[68]

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[63] P. Wardle and D. Cappe, "Reforming Ontario's Expert Evidence Rules" [unpublished] at 13, citing Brian Thompson, *The Problem with single joint experts* (2004) N.L.J. 154.7138.

[64] *BC Civil Justice Reform Working Group Report, supra* note 6 at 31.

[65] *BC Civil Justice Reform Working Group Report, supra* note 6 at 14.

[66] Task Force on the Discovery Process in Ontario, *Supplemental Report of the Task Force on the Discovery Process in Ontario* (October, 2005) at 16.

[67] Manitoba *Evidence Act*, CCSM c. E150, s. 25; New Brunswick *Evidence Act*, RSNB 1973, c. E-11, s. 23

[68] Alberta Rules, r. 218.4(1)

Saskatchewan permits each party to call five experts.[69] Quebec, Newfoundland and British Columbia appear to set no limit on the number of experts that may be called.[70] Similarly, Nova Scotia sets no maximum, although it is left to the court to limit the number of expert witnesses.[71]

During consultations, many called upon judges to consistently enforce the three-expert rule or impose other limits on the number of experts, either at trial or at a point before trial where parties have not yet incurred expenses relating to unnecessary expert reports. In motor vehicle litigation, some noted that regulations under the *Insurance Act* encourage multiple medical experts in various disciplines to be called and this unduly adds to the cost of litigation.[72]

Three mechanisms are considered below to better control the number of experts while permitting such evidence as is necessary to fairly dispose of a case: (i) strict enforcement of the three-expert rule, (ii) early judicial control on the number of experts and (iii) disallowing cost-recovery where in the view of the court the costs related to certain experts may have been incurred unnecessarily.

Section 12 of the *Evidence Act* seeks to limit the number of experts (to three), but with a balancing mechanism (leave from the trial judge to call more than three experts) that recognizes that more than three experts may reasonably be required in some cases. The problem is that, in practice, s. 12 is ignored by counsel and the courts. In addition, costs relating to an expert will have already been incurred before the trial judge deals with leave for more than three experts or with the issue whether any expert evidence on a particular issue is admissible. Thus, s. 12 does not appear to me to be effective in controlling the number of experts or costs related to experts.

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[69] Saskatchewan *Evidence Act*, c. S-16, s. 48

[70] Quebec Code of Civil Procedure, RSQ c. C-25 [hereinafter Quebec Rules]; Newfoundland Rules of Supreme Court 1986, SNF 1986, c. 42, Sch. D [hereinafter Newfoundland Rules]; British Columbia *Evidence Act*, RSBC 1996, C. 124

[71] Nova Scotia Civil Procedure Rules, E. 1/1, r. 31.06 [hereinafter Nova Scotia Rules].

[72] O. Reg. 461/96, s. 4.3.

Under the proposed reforms arising from the B.C. Civil Justice Reform Working Group, a case planning conference judge is to fix the appropriate number of experts early in the litigation process, in keeping with the overriding principle of proportionality.[73] This ensures early judicial control over the number of experts, before costs have been incurred in obtaining expert reports. For cases under $100,000 (the equivalent to our rule 76 simplified procedures cases), the B.C. report recommends each party be limited to one expert only, plus one expert to rebut the evidence of the opposing expert. In England and Wales, no expert evidence may be submitted unless the court's permission is first obtained,[74] and expert evidence is restricted to that which is reasonably required to resolve the proceeding.[75]

Given limited judicial resources and costs, I am reluctant to introduce further case conferences. However, discussion of expert-related issues can and ought to regularly occur at pre-trial conferences (rules 50.01, 76.10 and 78.10), settlement conferences (rule 77.14) and trial management conferences (rule 77.15). Clearly the number of experts to be called at trial is an issue that can be advanced and determined at the pre-trial/settlement conference stage. Appropriate amendments to s. 12 of the *Evidence Act* should be made to permit a pre-trial/settlement conference judge or master to make binding orders as to the appropriate number of experts to be called at trial.

The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.

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[73] *BC Civil Justice Reform Working Group Report, supra* note 6 at 32.
[74] UK Rules, r. 35.4.
[75] UK Rules, r. 35.1.

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias.

Secondly, this reform would consistently apply a standard for all experts that is already prescribed for some. For example, Article 4150 of the Canadian Institute of Actuaries Standards of Practice – General Standards, provides that "an actuary's testimony should be objective and responsive," and that "the actuary's role…..is to assist the court…and the actuary is not to be an advocate for one side of the matter in a dispute." An express duty would reinforce existing professional obligations and ensure that this duty is consistently applied to all professions that provide expert evidence.

Finally, the most relevant organizations on this issue, including the medical experts and actuaries who participated in this Review, endorsed imposing an overriding duty to the court on experts, along with a certification that they understand that duty. England and Wales, Queensland, Australia and the B.C. Civil Justice Reform Working Group have all endorsed this approach.

Expert bias can, I think, best be reduced or somewhat controlled by a "meet and confer" requirement. In its Supplemental Report, the Discovery Task Force proposed this as a best practice where there are contradictory expert reports.[76] The authority to require experts to meet and confer exists in other jurisdictions, including England and Wales,[77] and in Australia[78] under certain circumstances. In Alberta[79] and New Brunswick[80] the court may order experts to meet at the pre-trial stage. British Columbia's Civil Justice Working Group recommended that a case planning conference judge have the authority to order opposing experts to meet to identify areas of agreement or disagreement and narrow the issues.[81]

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[76] Task Force on the Discovery Process in Ontario, *Supplemental Report of the Task Force on the Discovery Process in Ontario* (October, 2005) at 16.
[77] U.K. Rules, r. 35.12.
[78] Australia Federal Court Rules, (Statutory Rules 1979 No. 140) r. 34A(3)

During consultations, medical experts noted that doctors often work well in forming consensus. They suggested that it would be very useful to have experts meet to consider whether issues can be agreed upon and determine which are still in dispute. For all experts, this reform would provide a level of peer review that expert opinions do not now routinely undergo. It may also assist in clarifying disparate interpretations of underlying facts and assumptions and would introduce a level of accountability that may deter "hired guns."

Time for Delivery of Expert Reports

The timing of delivery of expert reports under the current rules does not promote early settlement and may result in late requests for trial adjournments. Rule 53.03 requires a party who intends to call an expert to serve opposing parties with a copy of the expert's report not less than 90 days before trial.[82] A party who intends to call an expert to testify in response must serve a responding expert report not less than 60 days before trial.[83] Any supplementary report must be served not less than 30 days before trial. Anchoring these tight timelines to the trial event has been cited as a problem for both litigants and experts, resulting in last-minute requests for trial adjournments.

There was much support among those consulted for delivering expert reports sooner in order to promote early settlement of cases. Without disclosure of these reports, parties

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[79] Alberta Rules, r. 218.9(1). In very long trial matters, a case management judge may order experts to "consult on a without prejudice basis to determine any matters on which agreement can be reached."
[80] New Brunswick Rules, r. 50.09(g).
[81] *BC Civil Justice Reform Working Group Report*, *supra* note 6 at 32.
[82] Ontario Rules, r. 53.03(1).
[83] Ontario Rules, r. 53.03(2).

are often unwilling or unable to enter into meaningful settlement discussions. It was also said that the 90/60/30 day rule does not work because experts are often too busy to prepare a reply report in 30 days. In bilingual proceedings, these limits can make timely translation difficult.

Several organizations were in favour of anchoring the 90/60/30 day rule to the date of the pre-trial or settlement conference. Personal injury lawyers were largely in favour of this reform, but said that if the pre-trial is too far in advance of the trial (i.e., more than six months), expert reports may not be current by the time of a trial, resulting in additional costs incurred to update the reports.

In its 1996 *Report of the Task Force on Systems of Civil Justice*, the Canadian Bar Association recommended early disclosure of expert reports and the exchange of expert critique reports in a timely fashion before trial.[84] As mentioned earlier, the Discovery Task Force also considered this issue. It recommended the 90/60/30 day timelines be calculated from the date of the pre-trial or settlement conference, subject to a court order or the parties' agreement otherwise, provided that it remains possible to have meaningful pre-trial or settlement conference discussions.[85]

I note that rule 50.05 already requires parties to make available at the pre-trial all documents that may assist at the pre-trial, "such as medical reports and reports of experts." Rule 76.10(4) also requires the disclosure of expert reports at the pre-trial for simplified procedure cases, as does rule 77.14(6) for settlement conferences in case managed actions.

Linking the delivery of expert reports to the pre-trial assumes that there will be a pre-trial (in some areas, actions go to trial without a pre-trial) and that the pre-trial is held at a time reasonably proximate to the trial.

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[84] *CBA Systems of Civil Justice Report, supra* note 2 at 44.

[85] *Discovery Task Force Report, supra* note 3 at 128-131.

In the end it seemed clear to me that one rule, be it the 90/60/30 day rule or some other trilogy of numbers, simply will not work in all cases. In many commercial cases the simultaneous exchange of expert reports is often agreed to by counsel, who include in their agreement a specified time for each side to reply to the other's reports. In negligence actions, that model becomes impractical since a defendant frequently needs to know on what expert evidence the plaintiff's claim is being advanced.

In my view, the timing for delivery of expert reports is best left to counsel. They should be required to determine on a case specific basis when and how experts' reports will be exchanged.

In Toronto, once an action is set down for trial, parties are required to jointly or separately complete a Certification Form to Set Pre-Trial and Trial Dates. This form requires parties to identify when expert reports will be exchanged. Similar to the practice in Toronto, I would recommend that counsel be required to consult and seek to reach agreement on the timing of exchange of expert reports within the 60 day period following an action being set down for trial. This agreement should be documented and be before the pre-trial judge or master.

Where no agreement has been reached, a general default period should be established. Accordingly, I think that rule 53.03 should be amended so that expert reports, responding reports and any supplementary reports must be delivered within 90, 60, and 30 days, respectively, prior to pre-trials and settlement conferences. Since this is a default period, it would apply only where there is no agreement or court order obtained on motion to extend or abridge the default time lines.

There will still be those who will seek late requests to file expert reports on the eve of trial. During Review consultations, some judges said they feel compelled to permit late delivery of expert reports given the language of 53.08(1), which states leave "shall" be granted unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. Since time must be granted for the filing of reply reports, trial dates often have to be rescheduled. Thus, many proposed that the word "shall" be replaced by the word "may" in rule 53.08(1), so that judges do not feel compelled to allow late delivery of expert reports. I endorse this change, which would provide flexibility in appropriate cases and at the same time signal that allowing late delivery of expert reports should not be taken for granted.

During consultations it became clear that there was meagre support for rule changes that would permit some form of pre-trial oral examination of experts. In my view, this change would add yet another layer of cost in all cases involving experts for a questionable benefit. I do not recommend this reform. If, in a particular case, settlement discussions would be advanced if certain experts were examined, it would be open to counsel to agree to produce the experts for examination. This occurs now in some arbitrations.

Disclosure of Basis for Expert Opinion

I do, however, think that there should be more regulation of the standard content of expert reports.

In Queensland, Australia, experts are required to include in their report a description of their qualifications, all material facts on which their report is based, references to material that has been relied upon in forming the opinion and, if there is a range of opinion, a summary of that range and the reasons why the expert adopted a particular opinion.[86] Similarly, in its Supplemental Report, the Discovery Task Force recommended as a best practice that expert reports should include, at a minimum:

- ☐ Expert's name, address and current curriculum vitae;

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[86] Queensland, Australia, Uniform Civil Procedure Amendment Rule (No. 1) 2004, section 7, Part 5 – Expert Evidence, Division 2, online: Queensland Legislation <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

- A detailed description of the expert's qualifications and area of expertise;
- A description of research conducted by the expert to be able to reach his/her opinion;
- The nature of the opinion being sought and the specific issues to which the opinion relates;
- A description of the factual assumptions on which the opinion is based;
- A list of any documents relied upon in formulating the opinion; and
- The opinion and the basis for the opinion.

In the U.K., a Practice Direction prescribes the contents of an expert's report. In addition to many of the items recommended in the Discovery Task Force's best practice, the U.K. Practice Direction also requires the expert report to:

- Contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- Make clear which of the facts stated in the report are within the expert's own knowledge;
- Say who carried out any examination, measurement, test or experiment which the expert has used for the report, give qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision; and
- Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion.

Currently, rule 53.03 requires the expert only to set out his/her opinion, name, address, qualifications and the substance of his or her proposed testimony. It is silent about the degree of information to be provided in the report.

Recommendations (Expert Evidence)

- ☐ I do not recommend the mandatory use of joint experts. However, in appropriate circumstances, early in the litigation process, parties should discuss jointly retaining a single expert to reduce costs and avoid unnecessary competing expert reports, consistent with the Discovery Task Force's best practices.

- ☐ Amend rules 50.01, 76.10, 77.14, 77.15 and 78.10 to require the presiding judicial officer at pre-trials, settlement conferences and trial management conferences to consider and make orders as to the appropriate number of experts that may be called by each side and on particular issues and whether expert evidence is admissible.

- ☐ Amend section 12 of the *Evidence Act* to:
  - Make clear that a judge (or officer) presiding at pre-trial events (i.e., pre-trials, settlement conferences, trial management conferences), who may or may not be the presiding trial judge, may grant leave to call more than three experts (or fewer in simplified procedure cases). The residual discretion of the trial judge to vary a previous order on the number of experts will, I hope, be limited to situations where there has been a significant change in circumstances, or where manifest unfairness would result to a party at trial should they not be permitted to call additional experts.
  - List the following factors for the court to consider in exercising its discretion on the appropriate number of experts:
    - Whether the proposed number of experts is reasonably required for the fair and just resolution of the proceeding;

- Whether the proposed number of experts is consistent with the principle of keeping costs and the length of the proceeding proportionate to the amount or issues at stake;
- Any other factors relevant to the fair, just, expeditious and cost-effective resolution of the proceeding.

❑ Adopt a new provision (in the Rules of Civil Procedure or *Evidence Act*) to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Require the expert, in an expert report, to certify that he or she is aware of and understands this duty.

❑ Permit the presiding judicial official at pre-trials, settlement conferences and trial management conferences to order opposing experts in appropriate cases to:

- Meet, on a without prejudice basis, to discuss one or more issues in the respective expert reports to identify, clarify and, one would hope, resolve issues on which the experts disagree and
- Prepare a joint statement as to the areas of agreement, or reasons for continued disagreement

where in the opinion of the court

- there may be room for agreement on some or all issues,
- the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court or
- cost or time savings or other benefits can be achieved proportionate to the amounts at stake or the issues involved in the case.

❑ Amend the rules to require parties to discuss the number of experts and the timing for delivery of expert reports within 60 days of the action being set down for trial. As a default, rule 53.03 should be amended to require all expert reports to be exchanged within the 90/60/30 days before pre-trial or settlement conference, subject to the parties' agreement otherwise or court order.

☐ Amend rule 53.03 to require all expert reports to include the following information:

- Expert's name, address and current curriculum vitae;
- A detailed description of the expert's qualifications and area of expertise;
- A description of the instructions provided to the expert;
- The nature of the opinion being sought and the specific issues to which the opinion relates;
- A description of research conducted by the expert to be able to reach his/her opinion;
- A description of the factual assumptions on which the opinion is based;
- The list of any documents relied upon in formulating the opinion; and
- The opinion and the basis for the opinion. Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion.

10. LITIGATION MANAGEMENT

The Rules of Civil Procedure codify two general models for the management of litigation before trial. They are the ordinary procedure – the hands-off, traditional model – and the caseflow management model.

In the ordinary procedure, the parties themselves generally control the progression of an action as it moves, however quickly or slowly, to trial. The rules do contain three control devices: the status hearing (rule 48.14), matters assigned to a specific judge for management purposes (rule 37.15) and the general authority of the court to make appropriate orders and directions under rules 1.04 and 1.05.

The caseflow management model is different. Under case management, certain steps must be completed within prescribed timelines, failing which the court may intervene. For example, under rule 77 (and 24.1) mandatory mediation and settlement conferences must occur within specified times.

Case management is not uniform throughout the province. It applies in civil proceedings commenced in Ottawa and Essex Country (Windsor), and it used to apply in Toronto. In December 2004, rule 77 (case management) ceased to apply in Toronto. It was replaced with a three-year pilot project set out in rule 78. Through rule 78, Toronto actions are subject to fewer case management timelines and reduced rule-based judicial control. They are, however, subject to status hearings (rule 48.14), mandatory mediation (rule 24.1) and the assignment of an action by a judge or case management master to rule 77 case management where the parties consent or where "a party has taken steps that amount to chronic and substantial obstruction of the action."

On the subject of litigation management, it seems clear that there are two central issues:

i. Whether a form of litigation management should be available for certain cases that are not subject to case management rules.

ii. Whether any changes should be made to the case management rules (rules 77 or 78).

Litigation Management Outside Case Management Rules

Rules 48.14 and 37.15 permit active management by the court of ordinary procedure cases if certain conditions precedent are met. However, many question whether these rules confer sufficient authority to manage complex or otherwise difficult cases early enough in the litigation process. Some who responded in the consultation process expressed concern about the ability of a party to intentionally delay a proceeding with impunity. Many suggested that there should be immediate access to some form of case management in cases where there is a self-represented litigant.

Early judicial management is contemplated in the recommendations of the British Columbia Civil Justice Reform Working Group report. It recommended the introduction of a mandatory, early case-planning conference, to be presided over by a judge and held in each case where parties engage the civil justice system beyond initiating or responding to a claim. Its purpose would be to help manage the litigation early, proportionate to the needs of the case, and to canvas settlement.[87]

Management of cases not subject to case management was also discussed in Ontario's Discovery Task Force Report. Since oral and documentary discovery tend to be the most significant pre-trial steps in the litigation process, the task force's discussion on discovery management is relevant here. The task force concluded that the introduction of discovery management mechanisms into Ontario's discovery process would assist in reducing many of the key problems identified in its review. These problems include late delivery of affidavits of documents, incomplete and untimely production, excessive requests for information and documents, difficulties and delays in scheduling discoveries, improper refusals, delays in fulfilling undertakings, and disagreements as to the scope of discovery. The task force noted that parties in most cases are generally able to manage the discovery process efficiently without any court intervention, and it was therefore unwilling to impose a mandatory discovery management scheme for all cases. Instead, it found that court-assisted discovery management would be of greatest value in complex cases or those in which discovery problems can be anticipated.[88]

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[87] *BC Civil Justice Reform Working Group Report, supra* note 6 at 10.

Lawyers expressed general support for limited case management, that is, for case-tailored management where required – not a one size fits all approach to the management of cases. Those who favour a case management model do so on the basis that some lawyers cannot be relied on to move cases to completion within a reasonable time. They argue that the success of case management in Ottawa provides evidence that case management works and that it would, therefore, be a mistake to return to the ordinary procedure model.

One obvious feature of case management is that, although it is helpful in some cases, it is not needed in all cases, on any reasonable assessment. In those cases where counsel can effectively move the case forward, case management adds layers of cost that some convincingly say are unnecessary. It seems to me that the success of case management in Ottawa is a direct product of the proportionality-driven approach of the case management master there, who recognizes that some cases need active intervention and others none.

Case management or no case management, there are cases where it is clear to me that quick access to a judge (or master) would be useful in combating tactical, or even unintentional, delay.

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[88] *Discovery Task Force Report, supra* note 3 at 83.

Litigation management by a single judge or master for those cases that require it, as permitted under rule 37.15, has several benefits. It saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. I was advised that this has been the experience of many lawyers who appear regularly before Master R. Beaudoin who, until recently, was the sole case management master dealing with case managed cases in Ottawa.

As a general matter, it would enhance the efficiency of the system if masters had a broad jurisdiction to act in response to matters assigned or delegated to them by a judge. The Rules Committee can consider what direct jurisdiction masters should have.

Lastly, on the subject of masters, it seems to me that no useful purpose is served by maintaining the distinction between masters and case management masters. All masters should exercise the same jurisdiction and receive the same salary. To avoid unseemly and costly disputes about remuneration, masters' remuneration should be linked to that of the Ontario Court judges.

Any amendment to rule 37.15 should therefore provide for speedy mechanisms to obtain direction from the managing judge, master or case management master. These mechanisms may include a telephone or in-person case conference or a simplified process for motions to be made in writing with or without affidavits – similar to mechanisms currently in place under rules 76 and 77. This approach is also consistent with recommendations found elsewhere in this report that encourage obtaining orders on certain issues early, such as early leave for more than three experts or bifurcation of actions. Since only one judicial official would be managing the case in the steps leading up to trial, he or she would be in a good position to make such pre-trial orders early, based on the needs of the case.

No test is currently prescribed in rule 37.15 for the individualized management of "complicated proceedings" or a series of "proceedings that involve similar issues." The test to obtain case management under rule 78.12(3) is whether "a party has taken steps that amount to chronic and substantial obstruction of the action." In making this determination, the court is required to consider the factors set out in rule 77.09.1(5). The rule 78 test, however, may be set too high. For example, in cases without chronic and substantial obstruction, rule 78.12(3) would not permit case management where a case is inherently complex or where the unique nature of the case, witnesses or parties would likely result in frequent disputes during the proceeding. Rule 77.09.1(5) lists these and other factors that are often indicative of the types of matters that would benefit from individualized judicial management. In such cases, early direction from an assigned judge or master could assist in resolving procedural disputes.

My preference is that rule 37.15 should be used as the authority for case-tailored management where that kind of assistance is needed. The criteria contained in rule 77.09.1(5), in my view, provide an appropriate and non-exhaustive list of factors that the court should consider when deciding which cases are likely to need and benefit from individualized management. I note that these are the same criteria to be considered when deciding whether a rule 78 case involves "chronic and substantial obstruction." Accordingly, I think that these criteria should be considered when deciding whether a case would likely benefit from individualized management under rule 37.15.

In Chief Justice Smith's Practice Direction dated August 26, 2005, a party who seeks to be subject to rule 37.15 may make a request in writing to the Regional Senior Judge of their respective judicial region to have a judge appointed.[89] I think that this process should be set out in a newly amended rule 37.15. The written request should describe how the case meets the criteria in rule 37.15 and should be copied to all other parties.

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[89] Practice Direction issued by Chief Justice Heather J. Smith, Superior Court of Justice of Ontario, dated August 26, 2005, online at Ontario Courts, <http://www.ontariocourts.on.ca/superior_court_justice/notices/august2005.htm>.

Case Management Rules (77 and 78)

Since rule 77 case management applies in both Ottawa and Windsor, how things have worked out in those judicial centres is instructive. According to the County of Carleton Law Association submission, case management in Ottawa was successful over its first six years. Cases requiring judicial intervention were given timely access to the case management master or a judge where necessary. Mandatory mediation was viewed as a success in promoting settlement.

However, in the last three or four years the efficiency of the civil case management system in Ottawa has decreased, largely as a result of the inadequate complement of judges to manage civil cases. I recognize and accept that these judges are being squeezed given the constitutional and societal pressures for a speedy trial in criminal and family matters. I believe this is a problem that is not unique to Ottawa.

In Windsor, the bar noted that the system should provide more flexibility in the timing of the mandatory mediation. The bar suggested that for cases involving more than $50,000, the mediation should take place after examinations for discovery have been completed. The bar expressed some concern about rule 77 case management based on cost. Some suggested that the ordinary procedure is sufficient to move cases through the system. Those proposing a shift away from rule 77 case management in Windsor noted that case management has not been expanded throughout the province and that Toronto opted out of rule 77.

The Windsor Case Management Steering Committee may wish to seek further input from the local bench and bar as to whether any reforms to rule 77 in Essex County ought to be made. Similarly, the Civil Rules Committee may wish to reconsider the future role of rule 77 in the province. In Windsor, case management was originally introduced as a pilot project on September 4, 1990.[90] Civil case management under rule 77 came into force on February 3, 1997 in Toronto and Ottawa and was expanded to Windsor on December 31, 2002 to maintain a case management regime in Essex County and as part of an overall plan to expand rule 77 throughout the province.

In my view, a "case management if necessary, but not necessarily case management" model makes considerable sense. This is the process in place in Toronto, which has made substantial progress in reducing delay for both trials and motions. Some actions defined by type – such as medical/hospital negligence cases, which tend to be complex – would clearly benefit from case management or at least the appointment of a judge to address areas of ongoing disagreement.

Case management in Ottawa, as it works on the ground, and rule 78 case management in Toronto are closely related in practice. The master in Ottawa (now there are two masters) seems to know which cases require hands-on management and which do not. He responds quickly to requests from counsel for management assistance. That is how I think case management is supposed to work in Toronto under rule 78.

In my view, full-blown case management applicable to all cases is too costly. There is, as I have said, no doubt that case management is needed for some cases. However, it is not needed for all of them. The status hearing rule will control manifestly delinquent actions. An expanded rule 37.15 would permit counsel to obtain assistance from a judge (or master) when required. Simply put, those cases that do not require management will obviously not benefit from case management, and they should therefore not be forced to bear the extra costs that accompany it.

Recommendations (Litigation Management)

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[90] Essex Civil Case Management Rules, R.R.O. 1990, Reg. 189 (revoked on December 31, 2002).

- ☐ **Amend Rule 37.15 to:**
  - **Permit the court to order that a case be subject to rule 37.15 management by an individual judge, master or case management master where it is of the opinion that the case could benefit from management by a single judicial official, after considering the criteria contained in rule 77.09.1(5). An order to make a case subject to rule 37.15 may be made by the court on its own initiative or on written request to the Regional Senior Judge of the respective judicial region where the case was commenced, copied to all other parties.**
  - **Allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference or a simplified process for motions to be made in writing with or without affidavits, similar to the processes in rules 76 and 77.**

- ☐ **In the evaluation of rule 78, consider amending rule 78.12 to make the test and process to have a case subject to rule 77 case management consistent with the recommended process and test to have a case subject to individualized management under rule 37.15.**

- ☐ **The Office of the Chief Justice of the Superior Court of Justice and the Ministry of the Attorney General should monitor access to case management masters for civil case managed actions in Ottawa to ensure that the complement of case management masters is sufficient to meet the civil case management needs there.**

- **The Windsor Case Management Steering Committee should seek input from the local bench and bar as to whether any reforms to rule 77 in Essex County ought to be made.**

- **The Civil Rules Committee should consider the future role of rule 77 in the province. Relevant to this investigation would be any plans to expand the operation of rule 77, an assessment of the current operation of rule 77 in Windsor and Ottawa as an effective time- and cost-savings mechanism, the evaluation of rule 78 in Toronto, and alternative case management and non-case management models that may possibly be used to replace rule 77 (e.g., the ordinary procedure, rule 78, other models).**

- **Any proceeding in which a party is self-represented should be managed to the extent required, either under an expanded rule 37.15 or under rules 77 and 78.**

11. PRE-TRIALS AND TRIAL MANAGEMENT

Pre-Trial Conferences

Pre-trials represent an important step in the litigation process. They encourage settlement and may assist in identifying or narrowing the actual issues for trial. Through the pre-trial process, trial management orders and directions may be obtained so that the trial will proceed more efficiently. To achieve these objectives, all pre-trials must be meaningful events. Otherwise, they will be an unnecessary expense for litigants and a waste of limited judicial resources.

During consultations, many said that pre-trial conferences are often ineffective and in need of reform. The bar consistently reported that the effectiveness of pre-trials is dependent on the skills of the pre-trial judge. All concerned recognize that some judges are more skilled negotiators than others. Some, in making orders and directions for trial, are more activist than others. Some require parties to attend the pre-trial conference; others do not. Some will meet with parties who do attend; others will not speak to the parties under any circumstances. To my surprise, I learned that pre-trials are mandatory in some court locations, but available only upon request in others.

Pre-trials should, in my view, be held in all actions set down for trial. I also believe the pre-trial would generally be more effective if the parties attended and if the pre-trial judge spoke to them at some point in the process, as determined by the pre-trial judge with advice of counsel. I think that counsel will be able to identify those rare cases where involving the parties would be counter-productive. Parties should hear what the judge has to say about the case, in most circumstances. This will encourage a more reasonable approach to settlement. Where insurers are involved, it may not be practicable for an adjuster/claims manager to be present. If that is the case, defence counsel should ensure that someone with settlement authority is available by telephone. For longer pre-trials it seems to me that a representative of the insurer should attend.

Trial Management at the Pre-Trial

Where settlement is not achieved, I think that pre-trial judges should be more aggressive in setting out timetables for any remaining steps needed to get the action ready for trial. Judges should also make whatever orders are reasonably necessary to identify and narrow the trial issues and promote the most efficient use of trial time. This would include dealing with motions for leave to call more than three experts and issuing orders on the number of witnesses each side plans to call and how long each side will have to present its case.

During consultations, lawyers generally agreed that orders as to how long each side will have to present their case ought to be made at the pre-trial conference. The use of time limits for oral argument in the Court of Appeal has proven to be effective. It has improved the quality of advocacy and has been well received by the court. It has also been a significant factor in eliminating the court's backlog. As well, it is a feature of court business in several U.S. jurisdictions. I see no reason why trials should not be subject to scheduling orders. The scope of the time limit orders should include:

- the total allocated time for the trial;
- the time each side will have to present its case;
- how long each side will be allowed for discrete parts of its case, e.g., opening statements; and
- limitations on how, and how much, evidence may be presented.

I recognize that there are inherent uncertainties with trials that can make it difficult to fix time limits. Witnesses may take longer to testify than expected, the time needed for cross-examination is difficult to estimate and answers may have to be clarified during re-examinations. Accordingly, the trial judge must have discretion to alter any time limits imposed. However, if time limits ordered at the pre-trial are to be meaningful, trial judges should not too easily interfere with them. I would suggest that the trial judge should alter such orders only where unanticipated circumstances arise or in otherwise clear cases where the overall interests of justice require that they be amended.

The timing of the pre-trial conference was said to be important. If there is a long delay between the pre-trial and the trial, the pre-trial is less likely to be effective. As well, enough time must be made available for the pre-trial if it is to be effective for purposes of settlement and general trial management. In certain locations, pre-trials are scheduled for only 30 minutes, which was said to be insufficient for meaningful settlement or trial management discussions in most cases.

In most regions, pre-trials are scheduled at Assignment Court. In the section on Motion and Trial Scheduling, I find Assignment Court to be an inefficient use of judges' and counsels' time, which unnecessarily adds to the cost of litigation. An alternative administrative practice is therefore needed so that the court knows how much time counsel think will be required for an effective pre-trial and when it should be scheduled.

Although I have some reservations on the timing of pre-trials in Toronto, Assignment Court has been replaced in that region with a new process for scheduling pre-trials and trials that has much to commend it. Once the trial record is filed, the trial coordinator sends a Certification Form to Set Pre-Trial and Trial Dates to the parties. Each party must complete the form (either jointly or separately) and return it. The purpose of the form is to allow the trial coordinator to fix a date for the pre-trial and a tentative trial date, which is confirmed at the pre-trial conference. The form is not complicated. It asks for information on a variety of issues, including:

- the type of case;
- the time required for the pre-trial;
- the number of witnesses expected to be called at trial;
- whether expert reports have been exchanged and if not, when they are expected to be delivered;

- whether mediation has occurred; and
- the estimated length of time for trial.

Parties are then advised of the pre-trial date and the tentative trial date, which is confirmed at the pre-trial.

In my view, each region should consider adopting a similar administrative practice for scheduling pre-trials and tentative trial dates. The Toronto scheduling practice permits a sufficient block of time to be scheduled for pre-trials, based on input from counsel, and avoids the necessity of parties having to appear in Assignment Court. Tentative trial dates should be confirmed at the pre-trial. Beyond that, I would leave it to each region to determine the pre-trial and trial scheduling practice that works best there.

I think that pre-trials will be more effective if they are scheduled within the four to six months before trial in all regions. Also, as noted in the section on Expert Evidence, any expert reports filed by the time of pre-trial may become outdated by the time of trial if the pre-trial is scheduled too far out from the trial.

In particularly complex cases, where settlement or trial management discussions have not concluded, an informal process ought to be available to permit parties to return before the original pre-trial judge for a second pre-trial. While unnecessary in most cases, a second pre-trial will likely be of assistance when requested by counsel or ordered by the court. An informal administrative practice should be adopted in each region to permit parties to request a second pre-trial conference, preferably before the original pre-trial judge, to deal with any last-minute or outstanding settlement or trial management issues.

Trial Management During the Trial

At the Advocates' Society Policy Forum in March 2006, there was widespread consensus that all too frequently trials greatly exceed their estimated length. It was noted that this is often the result of poor trial management by both the bench and the bar and that greater discipline is required. Accordingly, considerable support was expressed for having the judiciary exercise more aggressive trial management before and during the trial.[91]

In the Court of Appeal's decision in *R.* v. *Felderhoff*, Justice Rosenberg commented on the important trial management function that trial judges ought to exercise. Relying on the court's inherent jurisdiction to control its own process, he said, "[I]t would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner."[92]

Although *Felderhoff* was a criminal trial, in my view Rosenberg J.A.'s reasons apply with equal force, or more, to civil proceedings. No rule amendments are required for a trial judge to make orders during the trial to control its duration, or to control the conduct of counsel that unnecessarily prolongs or unduly complicates the trial. In addition, rules 52 and 53 give judges certain express powers to control the manner in which a trial unfolds, including the appointment of an expert,[93] the order of presentation during a jury trial[94] and the power to disallow questions of a witness that are vexatious or irrelevant.[95]

Efficiencies at trial may also be achieved by having the pre-trial judge preside at the trial. Pre-trial judges often become familiar with the facts and issues in a case, and time would be wasted having to get a new trial judge up to speed, particularly in complex cases. The pre-trial judge may have expertise in a given area of law that may assist in the resolution of the case. Continuity by the same judicial official can also help ensure that trial management orders made at the pre-trial are fulfilled and that the trial proceeds as planned. However, under rule 50.04, a judge who conducts the pre-trial conference shall not preside at trial.

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[91] Advocates' Society, *Streamlining the Ontario Civil Justice System, supra* note 4 at 18.
[92] 2003 CanLII 37346 (ON C.A.), para 40.
[93] Ontario Rules, r. 52.03.
[94] Ontario rules, r. 52.07(1).
[95] Ontario rules, r. 53.01(2).

I recognize that this rule is intended to protect settlement discussions at pre-trial. In complex cases, it may be advisable to separate the settlement and trial management parts of the pre-trial so that a pre-trial judge dealing with trial management issues may serve as trial judge. In any event, I recommend that rule 50.04 be amended to permit the pre-trial judge to serve as trial judge, where the parties consent. Virtually all those consulted saw no impediment to the trial judge dealing with motions and trial management issues, similar to what arbitrators do in arbitration proceedings. Having the trial judge involved earlier in long complex cases will, in my view, enhance the efficiency of the process.

One trial management issue – bifurcation – requires separate comments. The power to order issues in an action to be split into two or more trials is not expressly conferred by statute or the Rules of Civil Procedure. The power to order bifurcated proceedings appears to exist as part of the inherent jurisdiction of the court. In the leading case, the Court of Appeal held that it is a "basic right" of a litigant to have all issues in dispute resolved in one trial and that bifurcation must therefore be regarded as "a narrowly circumscribed power." [96] In a later case, *Bourne v. Saunby*, the Ontario Court (General Division) listed fourteen criteria that the court should consider when evaluating the merits of a motion to sever liability from damages.[97] The catalogue of factors set out

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[96] *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*, (1986), 55 O.R. (2d) 56 (C.A.).

[97] *Bourne v. Saunby* (1993), 38 O.R. (3d) 555 (Gen. Div.). Factors to be considered when determining whether to bifurcate a proceeding, based on *Bourne v. Saunby* are:

i. are the issues to be tried simple;

ii. are the issues of liability clearly separate from the issues of damages;

iii. is the factual structure upon which the action is based so extraordinary and exceptional that there is good reason to depart from normal practice requiring that liability and damages be tried together;

in *Bourne*, though not an exhaustive list, is generally taken into account in determining whether bifurcation should be allowed. A decision of the Divisional Court suggests that a party's inability to fund the litigation is an "extraneous" factor that should not be considered when deciding whether to bifurcate a trial.[98]

While I view bifurcation to be the exception, cost considerations militate in favour of bifurcation in some cases. In commercial litigation, for example, when dealing with damages will expose a party and sometimes all parties to significant costs, it may make sense to separate the issues of liability and damages and deal with liability first. Upon the determination of one issue, parties may be inclined to settle the balance of the issues in dispute. This can result in a significant savings of time, money and judicial resources. It would also be of particular benefit to those litigants who cannot afford a trial of all issues. There is no doubt that bifurcation can delay the final resolution of the entire proceeding and, where issues overlap, evidence and testimony may need to be repeated. Where these concerns apply, a bifurcation order should not be made.

The Civil Rules Committee should consider prescribing, at least in general terms, when it is open to the court to make a bifurcation order. In the end, the court's discretion in

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iv. does the issue of causation touch equally upon the issues of liability and damages.
v. will the trial judge be better able to deal with the issues of the injuries of the plaintiff and his financial losses by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages;
vi. can a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff be more easily reached by trying the issues together;
vii. are the issues of liability and damages so inextricably bound together that they ought not to be severed;
viii. if the issues of liability and damages are severed, are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be;
ix. is there a clear advantage to all parties to have liability tried first;
x. will there be a substantial saving of costs;
xi. is it certain that the splitting of the case will save time, or will it lead to unnecessary delay;
xii. has there been an agreement by the parties to the action on the quantum of damages;
xiii. if a split be ordered, will the result of the trial on liability cause other plaintiffs in companion actions, based on the same facts, to withdraw or settle; and
xiv. is it likely that the trials on liability will put an end to the action.

[98] *Duffy v. Gillespie* (1997), 36 O.R. (3d) 443 (Div. Ct.).

making bifurcation orders should be expanded while recognizing that bifurcation remains the exception, not the rule.

Recommendations (Pre-trials and Trial Management)

- **Amend rule 50 to prescribe the dual purpose of a pre-trial conference: to discuss settlement of some or all of the issues, and to obtain any necessary orders and directions to ensure that the action is ready for trial and that the trial proceeds in an orderly and efficient manner.**

- **Judges skilled in negotiation and with expertise in the relevant subject matter should, where possible, preside over pre-trial conferences.**

- **Parties (or those with settlement authority) should be required to attend pre-trial conferences (or be available by telephone where physical attendance is not practicable).**

- **Pre-trial judges should make any necessary trial management orders that promote the most efficient use of trial time and, in particular, should be vested with the authority to impose time limits on the presentation of each side's case, subject to a residual discretion in the trial judge to alter such orders where unanticipated circumstances arise or in otherwise clear cases where the overall interests of justice require that they be amended.**

- **Each region should adopt an administrative practice, similar to the approach used in Toronto, for scheduling pre-trials and tentative trial dates, to permit a sufficient block of time to be scheduled for pre-trials and trials and to avoid the necessity of parties having to appear in Assignment Court. Tentative trial dates should be confirmed at the pre-trial.**

- **Pre-trials should be scheduled within four to six months of the trial.**

- **The judiciary should be encouraged to use their inherent authority to better regulate the conduct of trials so that trials proceed in an orderly and efficient manner.**

- **Amend rule 50.04 to permit the pre-trial judge to preside at trial where the parties consent.**

- **The Civil Rules Committee should consider addressing bifurcation in a rule that would permit an order for bifurcation to be made on motion by any party or on the court's own initiative, after hearing from the parties. Any rule permitting bifurcation could reference some or all of the 14 factors listed in *Bourne v. Saunby*.**

12. APPEALS

Ontario's current system of appeal routes is complicated. Three courts – the Court of Appeal, the Divisional Court and the Superior Court of Justice – have appellate jurisdiction in civil matters. Appeal routes differ depending on the court appealed from, the monetary amount at issue and whether the order appealed from is final or interlocutory.

In the mid- to late1990s, the unacceptable backlog in the Court of Appeal for Ontario was brought under control. For all practical purposes, it currently has no civil appeal backlog, except in those cases where there are trial transcript problems. (The latter may be an unintended consequence of the court's initiative to expedite transcript preparation in criminal proceedings.)

The Divisional Court, part of the Superior Court of Justice, exercises a substantial appellate jurisdiction in addition to its judicial review jurisdiction. Although Divisional Court resources are stretched, delay is not a pressing problem. I note, however, that when the Divisional Court appellate jurisdiction increases from $25,000 to $50,000 on October 1, 2007, the Divisional Court will inherit more appellate work. Inevitably, this will put more pressure on the Superior Court of Justice, particularly in Toronto, since more judges or more judge time will have to be committed to the Divisional Court at the expense of other Superior Court business.

As far back as I can recall, there has been a debate about what the Divisional Court should be doing and whether the generalist Superior Court (which provides the Divisional Court judges) should adjust so that judges with expertise in administrative law and judicial review preside in the Divisional Court. The debate includes the role of the Divisional Court. A frequently asked question is whether there should be more emphasis on the Divisional Court's judicial review jurisdiction and less on its appellate jurisdiction. Less frequently asked is whether there may be another way to deal with judicial review applications (the principal area of concern expressed about the Divisional Court), leaving the Divisional Court as an intermediate appellate court. This Review did not directly deal with these issues. This is something that the Law Commission of Ontario might consider addressing.

Where an appeal goes, as matters now stand, requires consideration of the unfascinating distinction between a final and interlocutory order. If the order is final, the appeal from it is to the Court of Appeal. If the order is interlocutory, the appeal is to the Divisional Court. That would present no problem if it were relatively easy to determine whether an order is final or interlocutory.

The most recent and, I think, useful example of the final/interlocutory order problem is found in *Capital Forms Income Steams Corp. v. Merrill Lynch Canada Inc.*, [2007] O.J. No. 2606. In that case, the entire 23-page judgment considered one issue – whether the order appealed from was final or interlocutory. The appeal was argued by two experienced counsel who both thought that the order in issue was final. In the end, after reserving judgment, the majority (Doherty and Jurianz JJ.A.) held that the order appealed from was interlocutory and that the appeal must therefore be quashed since the Court of Appeal had no jurisdiction to hear appeals from interlocutory orders. In dissent, Laskin J.A. disagreed. He concluded that the order appealed from was final. In his dissenting reasons he advanced the final/interlocutory order distinction. He wrote at para. 36:

> The distinction between final and interlocutory orders bedevils this court. Far too much ink has been spilled over the pages of the Ontario Reports, grappling with this distinction. Even when the parties themselves do not raise the issue, the court itself often feels compelled to do so – as it did in this case – because the court's jurisdiction to hear an appeal turns on the distinction: final orders are appealable as of right to this court; interlocutory orders are not.
>
> And yet, despite the very large number of decisions on whether a particular order is final or interlocutory, our court's jurisprudence on

> the distinction has been anything but a model of consistency .... The litigation bar – even the experienced members of that bar – cannot always fathom whether an order is final or not. There is no better example than this case. [footnote omitted]

I agree with Laskin J.A. that too much ink has been spilled over this issue. Would it not be better to confer jurisdiction on the Court of Appeal if the order appealed from finally disposes the action or application? If it does not, that is if the action will continue notwithstanding the order, the appeal is to the Divisional Court, in my view, with leave. The Civil Rules Committee should review this core issue and in the end, I hope, make a recommendation to the Attorney General for a legislative amendment to the *Courts of Justice Act* that would jettison the final/interlocutory distinction.

There are two other appeal-related issues that I think should be considered. The first concerns dismissed summary judgment motions and the second concerns appeals from certain awards in arbitrations.

Consultations revealed considerable support for singling out summary judgment orders by having appeals from those orders go to the Court of Appeal whether or not summary judgment is granted or dismissed. Currently, the appeal from a dismissed summary judgment motion is to the Divisional Court, with leave, while the appeal from a granted summary judgment order is to the Court of Appeal. The policy rationale for this distinction finds its home in the rationale for the distinction between interlocutory and final order.

There was also considerable support for having appeals from arbitration awards of more than $50,000 go to the Court of Appeal. This would establish a parallel process with s. 19 of the *Courts of Justice Act*, which provides the Court of Appeal with jurisdiction to hear appeals from trial judgments over $50,000 (as of October 1, 2007).

Recommendations (Appeals)

- The Law Commission of Ontario should undertake a review of the role of the Divisional Court as a court of intermediate appellate jurisdiction and make recommendations regarding the court's future role and jurisdiction. This review should consider both the judicial review and appellate jurisdiction of the Divisional Court.

- The Civil Rules Committee should consider and recommend to the Attorney General changes to the *Courts of Justice Act* so that only orders finally disposing of an action/application would be appealable to the Court of Appeal. Appeals from all other orders would be to the Divisional Court. The Civil Rules Committee can best determine if leave should be required and, if so, on what basis leave would be granted.

- Appeals from summary judgment orders issued under rule 20 should be to the Court of Appeal if the amount in issue is otherwise within the jurisdiction of the Court of Appeal.

- Appeals from awards through the *Arbitration Act* should be to the Court of Appeal if the amount involved (more than $50,000) brings the award within the monetary jurisdiction of the Court of Appeal.

13. MOTION AND TRIAL SCHEDULING

The judiciary has exclusive authority over the scheduling of matters heard before the court. This section identifies, for consideration by the judiciary, some of the problems and possible reform options that were identified with respect to trial and motion scheduling. Two principal issues were highlighted in the course of this Review:

i. How might trial scheduling practices be improved to reduce costs and improve access to a timely trial?

ii. How might motion scheduling practices be improved to reduce costs and improve access to a timely motion?

Trial Scheduling Practices

Trial scheduling has often been said to be an art, rather than a science. Judges and trial coordinators go to some length to balance numerous and unpredictable factors when scheduling trials to optimize the use of judicial and courtroom resources. Their efforts are to be commended. Yet the potential for further improvements to trial scheduling should be considered to reduce costs to litigants and improve access to the justice system.

Delays in scheduling trials were noted in many, but not all, regions. The most egregious delay was in Brampton, when as of November 2006 trial dates were not being fixed until 2010. This is unacceptable by any reasonable standard of measurement. The appointment of additional judges, as recommended elsewhere, is essential. It should also be noted that when earlier trial dates become available, for example because of settlements, the lawyers' schedules frequently make it impossible to take advantage of the opening.

During consultations, many recommended the elimination of Assignment Courts. Attendance at Assignment Court was said to be a waste of counsel's time that unnecessarily adds to the cost of litigation. It was also said to be a waste of the judge's time, since trial scheduling is primarily an administrative task that can be performed by trial coordinators.

From my experience, I agree with these comments. I recall Assignment Courts to be little more than a cattle call of lawyers, for which the appearance of counsel added nothing except costs to their clients. The judiciary should consider other methods of setting trial dates.

One option is to vest trial coordinators with sufficient authority to fix trial dates, with judicial oversight and direction called upon as needed. Parties could be required to jointly submit a form to the trial coordinator to confirm that a case is ready to proceed to trial and estimate trial duration, permitting a tentative trial date to be scheduled. A judge could subsequently confirm the actual trial date administratively or at the pre-trial conference. This is similar to the process currently used in Toronto region, where Assignment Court has been eliminated. A further option is to convene Assignment Court by way of teleconference, given that appearances are usually brief.

During consultations, lawyers complained of cases being repeatedly bumped from running lists because previously scheduled trials took longer than expected or because judges were otherwise unavailable. In the section on Pre-Trials and Trial Management, I recommend that pre-trial judges fix time limits on trials. If this were implemented, the length of trials, although inherently uncertain, would be more predictable with the result that scheduled trials would proceed on the date set.

Several groups strongly encouraged the adoption of fixed trial dates. Fixed trial dates, while preferred by lawyers and parties because they provide more trial date certainty, are effective only if there is a sufficient supply of judges and courtrooms so the trial can commence on the date promised. The success of fixed trial dates is entirely dependent upon the ability to accurately predict the number of cases that will proceed on a given date. Given the reality of a limited pool of judicial resources and the inherent and significant challenges faced by trial schedulers trying to maximize those resources, it may be difficult to move to a fixed trial date system at this time. Nonetheless, the goal must be to provide counsel and the parties with fixed, certain trial commencement dates.

Adjournments were also identified as a problem, given the havoc they create for judicial and court calendars. If fixed trial dates, or something close to it, is provided, adjournments should be much more difficult to obtain than they are now, even on consent. The notion of one free adjournment should be discarded.

The judiciary on its own may also wish to establish a standard or benchmark within which trials will be heard that would become a factor when setting regional calendars and trial dates. Such a standard would reflect the court's views on how long parties ought to wait to have a trial heard. Of course, given the challenges inherent in trial scheduling and changes to available judicial resources, any standard adopted would not be met in all cases. However, it would inform scheduling practices, promote earlier trial dates and provide some assurance to lawyers and litigants that trial dates will be available within a reasonable time of the case being ready for trial.

Motion Scheduling Practices

Delays in hearing motions varied among the regions, ranging from a few weeks to three months for short motions (i.e., one hour or less) and three to four months for longer motions.

In Ottawa, the delay in having motions heard was said by the bar to be growing, with short motions before a judge taking about six weeks to be heard, and long motions (one to two hours) about three months to be heard. Very long motions (more than two hours) were heard within six months, which was said to be the amount of time needed in order to permit counsel to exchange motion records, conduct cross-examinations and deliver factums. Short motions before masters were about two months out, and long motions before masters were about four months out.

In the Central East region – and in particular in Whitby, Newmarket and Barrie – the volume of civil motions was said to be on the increase. In Newmarket, long motions (over two hours) are heard at the next civil trial sitting and, as of June 14, 2007, the next civil sitting (October 8-26) was four months away.

In locations where there was no apparent delay, often the list was open-ended and overbooked so short motions scheduled to be heard could not be reached. This was reported to be a problem in Newmarket and Brampton, where additional judges were not always available to hear motions that were not reached.

In Toronto, the wait time to have a motion heard has decreased. Short motions (under two hours) before a judge are now heard within two to three months (down from three to four months), and long motions were generally heard within four months (down from five to six months). A five-minute appearance at the aptly named triage court is required in order to schedule a long motion. Motions to be heard by a master are heard within two to three weeks. These wait times were seen to be acceptable, except for matters of manifest urgency where scheduling problems were sometimes encountered.

The appointment of additional judges, particularly in those court locations experiencing significant delays in having long motions heard, can be expected to have the most significant and direct impact on improving access to the civil justice system. Until such time, the judiciary may wish to consider other improvements to motion scheduling to reduce cost and delay.

For example, to reduce the volume of short motions, very short motions might be heard at 9:30 a.m. chamber hearings, as done in the Commercial List and the 9:00 a.m. triage court. I understand some judges in other regions offer similar brief hearing times. Brief *ex parte*, scheduling, consent or other matters that need less than 10 minutes might be heard during this period, freeing up time on the ordinary short-motion list. This may help reduce the frequency of matters getting bumped off the short-motion list. To help further reduce the cost of such motions, these matters should be heard by teleconference (see the teleconference recommendations in the Technology section).

Having lawyers wait in court all day to argue a motion, however long the motion will be, is unacceptable on cost grounds. If motions were scheduled during fixed time slots, or even for the morning or afternoon court session, there would be a significant savings in cost to litigants. Many suggested that more motions be heard by teleconference so that time is not wasted attending court, especially for matters where clients usually do not attend. In Toronto, telephone case conferences under rule 77 case management were said to be an effective and efficient manner of resolving procedural matters in an action. Otherwise parties must bring a motion and typically appear in order to get the relief requested. It was also suggested that the judiciary move toward an individualized calendaring system so that the same judge would hear all substantive motions in a case.

A unique problem was also identified in Toronto. Short motions are booked through the motions scheduling unit, without any material being filed in advance. This is done so that time estimates can be considered at the time of booking and to prevent short-motion lists from becoming overbooked. However, this practice has resulted in the problem of "phantom motions" being scheduled. It is only at 2 p.m. two days before the motion is to be heard, when no confirmation form or other material is filed, that the court realizes that a scheduled motion will not be proceeding. I was advised that this is a regular occurrence, with three to four motions being scheduled per day without any material filed, resulting in considerable wasted time.

Timing of delivery of motion material and the motion confirmation form might also be reconsidered as a tool to improve motion scheduling. Under the rules, a moving party's motion material must be filed three days before the motion date, responding motion material filed two days before, and the confirmation form which includes the time estimate for the motion must be filed at 2 p.m. two days before. As a result, the list of motions scheduled to proceed cannot be finalized until two days before the motion is to be heard. This is too late to deal with an overbooked list. These time periods should be changed so that parties may be contacted to attend on another date in the event of an overbooked list. Moving these time periods back may also assist with the problem of "phantom motions" in Toronto. For example, if parties file material seven days in advance of the proposed motion date, and the motion confirmation form is due five days before the motion, this would provide the motions clerk time to re-schedule matters on overbooked lists or to fill lists that are underbooked due to phantom motions.

I see no reason why time limits for oral argument in long motions should not be imposed. This requires an early vetting of the motion. This procedure has proved to be effective in the Court of Appeal, where time limits are set for oral argument in all appeals. The vetting in the Court of Appeal is done by staff lawyers. There is a process in place for the staff lawyer's time allocation to be reviewed by a judge. This system has worked. It has helped eliminate the Court of Appeal's backlog. Most (including me) think time limits improved the quality of advocacy by making arguments more focused. In addition, the time allocation system, since it applies to all appeals, has made it easier to enforce time limits where a party is self-represented.

In Ottawa and Toronto (triage court), a case management master or a judge already vets motions estimated to be over two hours, to determine a timetable to ensure the motion is ready to proceed and to assign a date for the hearing of the motion. This procedure might be adopted in other regions with delays in hearing long motions (e.g., Brampton and Newmarket). It may involve a judge, master or possibly a staff lawyer (as in the Court of Appeal) reviewing a draft notice of motion or a one-page summary of the evidence and issues to be determined, and assigning time limits for oral argument. A 9:00 or 9:30 a.m. appointment, if adopted in the region, might be used for the purpose of developing a timetable for long motions and assigning time limits for oral argument.

Recommendations (Motion and Trial Scheduling)

- ☐ **The Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider options to:**
  - **Eliminate the requirement of personal attendance at Assignment Court and replace it with a new practice for setting trial dates (e.g., vest trial coordinators with the authority to set trial dates; use of an administrative form, jointly submitted by the parties, to permit trial dates to be set; use of teleconference hearings for Assignment Court; use of the Internet for fixing tentative trial dates).**
  - **Direct and enforce time limits on trials, to ensure greater certainty in trial duration and improved trial scheduling.**
  - **Adopt and consistently enforce a policy with respect to adjournments.**
  - **Establish outside time standards within which trials ought to be heard, to be considered when scheduling trials and to provide a benchmark for litigants to know when a trial date is likely to be available upon the case being set down for trial.**

- ☐ **The Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider:**
  - **The introduction of 9:00 or 9:30 a.m. chamber hearings to deal with *ex parte*, scheduling, consent or other matters that need less than 10 minutes and that would otherwise appear on motion lists. The chamber hearing would be in person or by teleconference.**

- **The use of more specific time slots for the hearing of motions (e.g., morning and afternoon slots) to reduce wasted waiting time in court.**
- **Greater use of teleconferencing for short motions. Amend rules 1.08 and 37 to permit the court to schedule and hear a matter by teleconference on its own initiative, or where requested by a party.**

☐ **The Civil Rules Committee should consider changing the times for delivery of motion materials and the motion confirmation form by moving those times further back (e.g., seven and five days, respectively, before the motion is to be heard).**

☐ **An early vetting procedure for long motions be introduced in court locations with busy long-motion lists (e.g., Brampton and Newmarket) and other locations as needed. This process would help ensure that the motion will be ready to proceed and would help in allotting an appropriate block of time for the hearing. Time limits for oral argument may also be set.**

14. VENUE

In July 2004, a new venue rule (rule 13.1) was introduced in the Rules of Civil Procedure. Under the former rule, regardless of the place where a proceeding was commenced, the plaintiff could choose the place of trial, which could be anywhere in Ontario. A defendant could then seek a change of venue for the trial if the balance of convenience or considerations of fairness favoured holding the trial elsewhere. Generally, motions to change venue were heard in the county where the plaintiff's solicitor's office was located.

Under the new venue rule, a plaintiff may still commence a proceeding anywhere and the place of commencement then determines where any motions will be heard. However, the new venue rule includes expanded authority to change venue on motion of any party, based on the interests of justice.

During consultations lawyers, particularly in northern Ontario, complained about the costs to which their clients are exposed in seeking an order to change venue. The complaints were not about the substance of the venue rule, but rather about the process engaged – and its cost – when a change of venue is sought. An example will illustrate this concern. An action is started in Toronto in circumstances where the debtor and the security are in Sudbury, which is also where the contract creating the debt was made. The venue should be Sudbury, not Toronto. To change the venue, the motion must be brought in Toronto and, of course, a motion record with affidavit evidence is required, absent a court order. All of this costs money and, in this example, the moving party resents having to incur these costs and the related inconvenience.

I recognize that bulk users of the system (typically creditors) also want to reduce costs by starting all of their actions for recovery of money in one centre, in the example above, Toronto. I have no problem with this. The narrow issue is how to change venue in the most cost-efficient, fair way.

Recommendations (Venue)

- ☐ It seems to me that in a better world, plaintiffs should be able to start an action anywhere by filing the claim electronically. To the extent feasible, the claim should then electronically be moved to the venue stated in the claim.
- ☐ There should be a more streamlined way of securing a change of venue (e.g., by filing a two-page simplified motion form with or without affidavit evidence, modeled after the simplified procedure and case management rules).
- ☐ Venue change motions should be heard in writing or by telephone conference call, subject to a direction to the contrary if any oral argument is required. In clear cases, such as in the example cited above, the moving party should receive full indemnity costs payable forthwith.
- ☐ In the alternative, amend rules 37.03(1), 38.03(1), 77.01(5) and 76.05(2) to permit a party to bring a motion to change venue at any court location.

15. CIVILITY

Litigation in the adversary system too frequently gives rise to underlying partisan conduct by members of the bar. Too often, the "I'm the toughest gun in town" mentality is a part of some lawyers' marketing of their services and conduct. The overworked maxim – "a lawsuit is not a tea party" – should not remotely be taken to justify uncivil or unethical behaviour.

Judges have every right to *demand* that counsel act in a civil manner in court in dealing with both the court and opposing counsel. Unacceptable in-court conduct should give rise to sanctions, which include contempt citations and cost orders. Having been there, it continues to amaze me how some lawyers (a very distinct minority) seem to think that conduct that will reasonably be seen by others, including the trial judge and jury, as unduly aggressive actually benefits their clients.

Out-of-the-courtroom incivility is more difficult to control. The Law Society of Upper Canada as the regulator of the profession obviously has a role in dealing with complaints about lawyers' conduct. Its Rules of Professional Conduct prohibit uncivil behaviour and sharp practice. The need is enforcement, not more rules.

In addition, in July 2006 the Canadian Bar Association updated its Code of Professional Conduct (first adopted in 1920) by introducing principles of civility for advocates. The code includes a caution advising lawyers that rude or disruptive conduct may merit disciplinary action.[99]

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[99] The Canadian Bar Association, *Code of Professional Conduct, Principles of Civility for Advocates* at p 129, online at: Canadian Bar Association <http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf>.

The Advocates' Society has also prepared *The Principles of Civility for Advocates*, which provides substantial guidance on relations with opposing counsel, communications with others, trial conduct and counsel's relations with the judiciary.[100]

If a lawyer's professional standing is not enough incentive to promote civil conduct, the Rules of Civil Procedure allow the court to monitor the conduct of lawyers and, where appropriate, make cost orders against them. Rule 57.07 provides that where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or default, the court may: disallow costs between the solicitor and client or direct the solicitor to repay the client money paid on account of costs; direct the solicitor to reimburse the client for any costs that the client has been ordered to pay to any other party; or require the solicitor to personally pay the costs of any party. The Lawyer's Professional Indemnity Corporation (LawPro) has recently advocated that lawyers behave in a civil manner in order to avoid rule 57.07 claims for costs, noting that such claims have been on the rise in the past three years.[101]

I recognize that the Law Society does not have the resources to conduct a full investigation of every reported instance of uncivil conduct. However, I would think that a letter from the Law Society may well have a considerable therapeutic effect in those cases where a full investigation is not warranted. So will cost orders made in those relatively rare cases where the court concludes that the solicitor personally pay the costs of a party.

Despite the increased focus in recent years on civility in continuing legal education, in some law schools and in codes of conduct drafted by professional associations, stories of uncivil behaviour among lawyers are all too common. The issue of civility is particularly important for a self-regulating profession in which rules and standards are developed and collectively applied by members of the profession itself. The rules regulating conduct are already in place, and there are ample resources for lawyers to learn more about professional conduct and civility issues. As a result, lawyers who fail to adhere to these rules should not be easily excused from their breaches.

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[100] The Advocates' Society, *Principles of Civility for Advocates* online at: The Advocates' Society <http://www.advocates.ca/civility/principles.html>.
[101] LawPro, *A Special Report: Litigation Tidal Wave, Your Liability for Costs*, Part 4 of 6, online at: LawPro, <http://www.lawpro.ca/News/archive_sections/Special_Report4.asp>.

Recommendations (Civility)

- **The need for ethical behaviour is part of the curriculum in law schools now. Civility is a subset of ethical behaviour that should be emphasized in law schools where this does not now occur.**

- **Law firms should provide instruction to articling students that would emphasize the importance of civility. Uncivil conduct by articling students should not be tolerated.**

- **Judges should move to zero tolerance mode when confronted with uncivil behaviour in the courtroom. There is an array of remedies available, including moral suasion, reporting the offending counsel to the Law Society, cost orders and, in egregious circumstances, the contempt process.**

- **Lawyers should not be reluctant to report instances of uncivil behaviour to the Law Society. If the Law Society does not know about uncivil conduct, it can hardly be blamed for not responding to it.**

16. TECHNOLOGY IN THE CIVIL JUSTICE SYSTEM

What became clear to me in my meetings with the Technology Advisory Committee is that there are three aspects to the use of technology in civil litigation: (a) between lawyers/parties; (b) by the court; and (c) by courts administration.

Technological Solutions between Lawyers

It appears to me that the bulk of technological solutions that can assist in reducing cost in civil litigation are those used by and between the parties. I wish to point out only a few examples to explain the potential benefits.

As referenced in the section on Discovery and recommended in the E-Discovery Guidelines and *The Sedona Canada Principles*, parties are encouraged to discuss the use of technology early in the litigation process. In particular, they should address how documents are to be produced electronically and how information will be shared. Once electronic production is agreed on, documents may be imported into the litigation management software employed by the respective lawyers. This software may be used to quickly search and retrieve all documents relevant to the case and make cross-references to pleadings, transcripts and other notes made by counsel. It offers significant time savings that simply cannot be achieved in a paper world. Producing paper (hard copy) will frequently result in significantly higher costs to the parties. There often is a better way.

Large volumes of paper documents may be scanned as image files and exchanged on CDs, often at substantially less cost than would be involved in producing a similar number of photocopied sets. For example, in a case involving 50,000 documents, the cost of producing five copies of each document at $0.25 per page is $62,500. In contrast, scanning the documents by a company offering document and litigation management services may cost approximately $12,000. Parties should be encouraged to agree upon a company providing these services to achieve these cost savings. Once scanned, the documents may be imported into litigation management software applications.

I believe that many lawyers are increasingly taking advantage of these technologies. They should be encouraged to use them more where cost or time savings can be achieved. The failure to handle documents in a cost-efficient way should be taken into account when the costs of the proceeding are dealt with.

Technological Solutions in the Courts

The second aspect of technology in the civil justice system is technology that is used by the presiding judge or master. For example, under rule 1.08(1) all or part of certain hearings may be heard or conducted by telephone or videoconference, if these facilities are available at the court or provided by a party. The court may direct the proceeding to be heard by telephone or videoconference where parties make such a request on consent or where a party brings a motion for such an order.[102] There is, however, no express authority for the court to order that a matter be heard by telephone or videoconference on the court's initiative. This ought to be corrected, and this authority exercised particularly for short procedural matters or where significant travel by counsel or the parties may be required.

Technology may also be used for the presentation of evidence. In some document intensive cases, the parties and the presiding judicial official have made arrangements to use technology during a motion, trial or other hearing. For example, the judge may be provided with a CD containing all relevant documents to be referred to at the hearing. In some cases, the parties have arranged for the judge to be trained on litigation management software so he or she can retrieve and make notes on the files in the CD.

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[102] Ontario Rules, r. 1.08(2) and (3). Note that events in rule 77 case managed actions may also be heard by telephone or video conference, see, e.g., R. 77.12 (2.1).

British Columbia Model Practice Direction

In July 2006, Chief Justice Donald Brenner of the Supreme Court of British Columbia issued a practice direction on electronic documents and evidence in that province.[103] It sets out a framework for both the electronic exchange of documents between the parties and the presentation of electronic documents to the court at trial. It applies where parties agree or where the court has made an order. Parties are encouraged to adopt the Practice Direction where a substantial part of the discoverable documents is in an electronic form, where there are more than 1,000 potentially discoverable documents or where there are more than three parties to the proceeding. The Practice Direction includes checklists and a glossary of terms to assist with effective implementation. The Judges Technology Advisory Committee of the Canadian Judicial Council is monitoring the British Columbia Practice Direction and is considering it as a model for adoption by other jurisdictions throughout Canada.

Technological Solutions in Courts Administration

The Court Services Division (CSD) of the Ministry of the Attorney General is responsible for the technology used by courts administration. Since 2001, CSD has developed a plan for several technological advances, following the demise of the Integrated Justice Project that was to deliver very ambitious technological improvements for all justice ministries. The plan focuses on the gradual introduction of technology into the justice system, as opposed to the quick and massive change contemplated by the Integrated Justice Project. It seeks to phase in technological improvements over a multi-year period to directly support identified business priorities.

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[103] Chief Justice Donald Brenner, *Practice Direction re: Electronic Evidence* (The Supreme Court of British Columbia, July 1, 2006), online at: British Columbia Courts Website, <http://www.courts.gov.bc.ca/sc/practice%20directions%20and%20notices/Civil/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf>.

Civil Justice Reform Project

Since 2001, CSD has introduced a number of significant technological advances in Ontario's courts. Those that have an impact on civil cases include:

- **A provincial case tracking system (FRANK):** FRANK provides a single, centrally managed case tracking system for use by court staff in civil, family, small claims and Divisional Court cases as well as Superior Court criminal cases. It automatically monitors regulated time periods for individual cases as prescribed by the rules; provides an automated index of cases; generates many required forms, notices and court lists; and also provides a calendaring and scheduling tool for trial schedulers.
- **Video conferencing:** Video conferencing equipment and hard wiring has been installed in 51 court locations.
- **Electronic Courtroom in Toronto region:** A model electronic courtroom was created in the Toronto Superior Court of Justice to service a high-volume commercial court and support large volumes of evidence, electronic evidence presentation and remote witness testimony, particularly in multi-jurisdictional hearings.
- **Document cameras:** Document cameras capture paper and other physical evidence and project the image in the courtroom. They are the modern equivalent of an "overhead" projector, and they are available at 62 court locations.
- **Mobile IT cart:** A portable cart delivers a laptop computer, video projection and playback, audio amplification, a document camera and laser printer. The carts are available at 57 court locations.
- **Internet access:** Plans are in place to expand Internet access over the next year with the move to a new government telecommunications vendor of record.
- **Audio amplification for hearing impaired:** Sound systems are available in 32 court locations to amplify sound in a courtroom for those with hearing impairments.

A key element of CSD's future plan is to add document management functionality to FRANK in 2008-09, which will then permit the re-introduction of electronic filing of documents in the civil justice system. Once in place, the capacity to file documents electronically will be a major advance. I hope that this project can be accelerated.

The ministry has also established a Court Reporting Review, guided by an External Advisory Committee, to assess options and technology to improve the taking of the record and transcript production for Ontario's courts. In the fall of 2007, recommendations are to be submitted to the Deputy Attorney General on an improved model to modernize court reporting and transcript production services. Given the pervasive concerns about delay in transcript production in both criminal and civil matters, I endorse this initiative. Transcript preparation in civil matters has been compromised because of the priority given to the preparation of criminal transcripts. There is, in my view, a clear need to determine whether there are better ways to produce a trial transcript – criminal or civil.

Collective Action Essential

Justice stakeholders (the bench, the bar and the ministry) have explored technological initiatives, mainly on a case-by-case basis. These initiatives should be commended, encouraged and expanded. That said, further progress in the area of technology will also require collective action from the bench, the bar and the ministry. I think it is important that judges not only be part of, but also lead, these collective efforts. In what I view to be an interim period in which the use of technology is advanced on a case-by-case basis, the bench and courts administration should do everything within reason to accommodate technology-related requests from the bar.

I believe it is beyond the scope of this Review to propose broad system-wide changes to mandate the use of technology in civil litigation. Moreover, based on the expensive lessons of the Integrated Justice Project, I believe it would be unwise for me to propose broad systemic technological reforms. But that does not mean that the many clearly identified technology-related issues should be put on the shelf or otherwise unreasonably deferred.

Accordingly, I recommend that a committee be struck to determine what incremental technological improvements should be introduced at three pilot court locations – a small, medium and large Ontario court. This proposal recognizes the fact that different court locations may have different technological needs. I suggest that the committee be comprised of nine members, with one member representing each of the bench, bar and courts administration from each of the three sites. The committee should deliver recommendations jointly to the Attorney General, the Chief Justice of Ontario and – since many technological improvements will likely have an impact on courts administration and the functions of the trial judiciary – the Chief Justice of the Superior Court of Justice.

Recommendations should be detailed, taking into consideration policy, legal, cost and operational impacts. They should also include processes to evaluate any reforms implemented. A non-exhaustive list of issues to be considered includes:

- Whether a technological improvement will enhance or impede access to justice;
- The implications for court security and a litigant's privacy interests should broad and unrestricted access to court files, dockets and schedules become available through the Internet;
- The impact of any technological improvement on current business practices of the courts;
- Whether there is a broad appetite for a given technological solution. If not, the solution may not be used and would represent a waste of resources. Local versus provincial implementation should be considered as an option;
- The cost, benefits and resources available to fund any technological reform; and
- The tools available to evaluate the success of the reform.

Recommendations (Technology)

- **Parties and their counsel should be encouraged to explore methods of using technology to share information electronically to achieve time and cost savings. The judiciary and courts administration should make every reasonable effort to accommodate requests for the use of technology in individual cases, where possible.**

- **Rules 1.08 and 37 should be amended to permit a party to propose, or the court to order on its own initiative, that any matter referred to in rule 1.08 be heard by telephone or video conference.**

- **A committee of nine – comprised of a member of the bench, bar and courts administration from a small, medium and large court location in Ontario – be struck to make recommendations, jointly to the Attorney General, the Chief Justice of the Superior Court of Justice and the Chief Justice of Ontario, on technological improvements that may be made at each of the three court locations. Recommendations should be detailed, taking into consideration policy, legal, cost and operational impacts. They should also include a process to evaluate any improvements implemented.**

- **Additional training should be provided to judges on all aspects of the use of technology in and out of the courtroom. This is a matter that is being addressed by the Judges' Technology Advisory Committee of the Canadian Judicial Council. The National Judicial Institute and the Ministry of the Attorney General should participate, where possible, in assisting with such training.**

17. CIVIL RULES COMMITTEE

The Civil Rules Committee's mandate is to make recommendations to the Attorney General for rules in relation to civil practice and procedure for the Court of Appeal, the Superior Court of Justice and the Small Claims Court, which is a branch of the Superior Court of Justice. The committee is comprised of 29 members and is divided into four subcommittees responsible for considering reforms in discrete areas of procedure.

The committee also has a secretariat comprised of a private bar counsel, an academic, a judge and a lawyer from the Ministry of the Attorney General. Currently, the secretariat reviews and analyzes all proposed rule changes and provides commentary before forwarding submissions to the committee for review. It also occasionally consults with stakeholders where directed by the committee. It is reactive in the sense it does not generally advance new proposals to the committee or engage in long-term justice reform planning. Anyone can request a rule amendment by writing to the committee's secretary.

The secretariat has provided invaluable support to the Civil Rules Committee. Its four members have significant expertise in civil procedure and they have diligently considered potential reforms to the Rules of Civil Procedure. Proposed changes are analyzed in carefully written memoranda. Although the secretariat's work is commendable, it seems to me that the secretariat, guided by the chair of the committee, could play a larger, more proactive role in rule reform.

In the course of this Review, three primary issues relating to the Civil Rules Committee have been identified:

i. Whether the size of the committee should be reduced to make its operation more efficient, and if so, to what extent.

ii. Whether the committee should be more transparent, and if so, how to provide greater transparency.

iii. Whether improvements to the role and function of the secretariat may be made.

Several Canadian jurisdictions do not have a formal Civil Rules Committee (e.g., Quebec, Nunavut, the Northwest Territories, Saskatchewan and the Yukon). All Canadian jurisdictions that have a formal rules committee have smaller committees than Ontario does. After Ontario's 29 members, the next highest level of committee membership is Manitoba with 16 members (though only 12 members vote). Other than Manitoba and Ontario, no other Canadian jurisdiction has more than 11 committee members, while most have 10 or less.

While I accept that civil justice stakeholders should be represented on the Rules Committee, it seems to me that the committee would be more effective if it were smaller. As a first step, the Rules Committee itself should consider this issue and make recommendations to the Attorney General concerning downsizing the committee.

The agenda and minutes of the Civil Rules Committee are not publicly available. Although committee membership is not a secret, it is difficult to determine. While there are private bar members on the committee, the lack of disclosure of committee activities limits transparency in the committee's agenda and decision-making process.

Manifestly, transparency could be improved immediately by making the committee's membership, agenda and minutes public. This would provide interested parties with a more complete picture of the committee's composition, deliberations and issues under active consideration. Publishing such information on a website would provide a cost-effective mechanism to keep lawyers and other interested parties informed. It would also improve the consultation process and allow those interested to engage in the committee's work. It might well result in higher quality submissions for consideration by the committee's secretariat.

There may well be some reasonable concern about publishing the full and detailed minutes of committee meetings or even a summary of its deliberations. Members may not be frank in discussing their experiences and revealing their views on a proposed reform if all aspects of committee meetings were published. I understand that concern. To the extent that this concern about minutes is legitimate, it does not apply to the committee's meeting agendas or to its composition.

Recommendations (Civil Rules Committee)

- ☐ **The Civil Rules Committee itself should make recommendations to the Attorney General on the downsizing of the committee.**

- ☐ **Committee membership lists and meeting agendas should be posted on the Ontario Courts website. The Civil Rules Committee should consider whether and to what extent minutes of its meetings might also be posted on the website.**

- ☐ **The Civil Rules Committee, with input from the secretariat, should recommend options to the Attorney General, the Chief Justice of Ontario and the Chief Justice of the Superior Court for a strengthened secretariat mandate that is both responsive to immediate calls for rule reform and proactive in considering and analyzing potential short- and long-term civil justice reforms for Ontario.**

18. AUTOMOBILE NEGLIGENCE CLAIMS

I have considered negligence claims arising out of the ownership, use or operation of an automobile separately from other types of claims simply because there are so many of them. They represent the most common case type commenced in the Superior Court of Justice (21%).[104] Although a substantial majority of automobile negligence actions settle, these claims are a major consumer of institutional and judicial resources. They are frequently complicated by accident benefit and verbal threshold issues. Many of them are tried with a jury.

As matters now stand, through Bill 198 amendments to the *Insurance Act* in 1996 and regulations thereunder, these claims are subject to a $30,000 deductible unless the judgment exceeds $100,000.[105] Where applicable, this deductible is a tax on damages, obviously intended to lower loss costs and thus premiums by discouraging plaintiffs and their counsel from pursuing smaller claims. Put crassly, no one of sound mind is likely to pursue a $30,000 or $40,000 claim if $30,000 of it is to be deducted at the end. I am certain that insurers can provide estimates of the impact of the $30,000 deduction on premiums. That exercise is beyond the scope of this Review.

In addition to the $30,000 deduction, through amendments to Regulation 461/96,[106] Ontario introduced a verbal threshold that seems to require that plaintiffs must prove that their injuries are serious and permanent. The verbal threshold, through s. 4.2(1) of the regulation, requires that plaintiffs establish that they sustained a permanent serious impairment of an important physical, mental or psychological function. The regulation sets out: a detailed definition of the criteria for impairment hinging on a test of substantial interference; detailed criteria for determining when a function that is impaired may be considered an important function; and further detailed criteria for assessing whether the impairment is permanent. Section 4.3(1) then sets out the medical evidentiary requirements that must be met to support a claim of permanent serious impairment.

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[104] *Civil & Small Claims Court Statistics 2005-06, supra* note 10 at 10. Of the 62,251 cases commenced in 2005-06, 13,196 were motor vehicle cases (21%), followed by 11,399 collection of liquidated debt cases (18%), and 8,585 mortgage cases (14%).

[105] *Insurance Act*, RSO 1990, c. I.8, s. 267.5(7); O. Reg 461/96, s. 5.1, as amended by O. Reg. 312/03 and 381/03.

[106] O. Reg. 381/03 amended O. Reg. 461/96.

The threshold issue is for the trial judge, not the jury. When the threshold is an issue, and where the trial is by jury, the trial judge typically will deal with the threshold issue after the jury charge and while the jury is deliberating. If the trial judge concludes that the plaintiff has not met the threshold test, the plaintiff has no right to sue. This is simple enough except for the fact that this revelation occurs after the entire trial has been completed with its attendant costs.

I should note that the new threshold (under Bill 198 and the amended regulation 461/96) is relevant to what, I was told, is a large number of cases in the pipeline. To date, the Bill 198 threshold has not been considered by the Court of Appeal. It has, of course, been applied in settlement negotiations in many cases in which it is an issue.

I think that it is clear that the objective of the verbal threshold is to keep smaller cases out of the system by denying plaintiffs the right to sue in such cases. If that sounds familiar, it is because that is generally the purpose of the $30,000 deductible. I accept that there is a substantial public and government interest in keeping automobile premiums under control. I also accept the inevitable correlations between insurers' bodily injury loss costs and premiums – as one goes up, so does the other. What automobile claims costs are, and whether automobile insurers are making or losing money, is not for me to determine.

I thus limit the expression of my concern to the efficacy of the verbal threshold. In that context I ask two questions. First, and in light of the generally similar purposes of the deductible and the verbal threshold, what claims are excluded by the verbal threshold that would not be excluded by the deductible? Second, one direct beneficiary of the verbal threshold regulation is the medical profession that provides medical-legal reports on the threshold issue. It would be interesting to know what costs are incurred by both plaintiffs and insurers in developing evidence relevant to the threshold issue. I have no idea exactly what those costs are. However, I feel safe in saying many millions of dollars are involved. By contrast, the $30,000 deductible carries almost no transaction costs since it essentially involves an arithmetic exercise.

Both the deductible and the verbal threshold have access to justice implications. Both work to restrict access to the courts by providing an economic disincentive to making a claim. At the end of the day, for those cases that do proceed, the deductible where applicable saves claims costs (by lopping $30,000 from the plaintiff's damages) and the verbal threshold, if not met, means that the plaintiff's action is dismissed.

Under s. 289.1 of the *Insurance Act*, the Superintendent of Financial Services is required to undertake at least every five years (or more often as requested by the Minister of Finance) a review of Part VI of the Act and regulations and to recommend "any amendments that the Superintendent believes will improve the effectiveness and administration" of Part VI and the regulations. It seems to me that this would be the appropriate avenue for a more thorough study of all elements of Bill 198, including the deductible and the threshold.

I would urge the Superintendent to include in his deliberations what net benefit accrues from the existence of the verbal threshold in circumstances given the existence of the $30,000 deductible. If there are claims excluded by the verbal threshold that would not have been excluded by the deductible, is it in the public interest that such claims be excluded? If, for example, claims of children or the unemployed elderly are excluded, considerable thought might be given to the integrity of that exclusion.

Recommendations (Automobile Negligence Claims)

- The Superintendent of Financial Services, in conducting the next review of Part VI of the *Insurance Act* and the regulations under it, should consider the following questions:

    a) What has been the actual impact on loss costs and premiums of the transition from the earlier verbal threshold to the current threshold?

    b) If it is found that some claims were excluded by the verbal threshold that would not be excluded by the deductible, who are the claimants excluded from pursuing remedies in the civil justice system and what are their injuries? These are both important public interest considerations; and

    c) Should the deductible, now $30,000, applicable to some actions be increased, decreased or abandoned?

19. PROPORTIONALITY AND COSTS OF LITIGATION

I referred to the proportionality principle in the introduction to this Summary of Findings and Recommendations. Although this section is somewhat repetitious, the issue of proportionality is central to this undertaking. Proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake. It should be expressly referenced in the Rules of Civil Procedure as an overarching, guiding principle when the court makes any order.

In my view, the civil justice system somehow has to recognize the principle of proportionality as having a broad application to all civil proceedings, so that courts and parties deal with cases in a manner that reflects what is involved in the litigation, its jurisprudential importance and the inherent complexity of the proceeding. To that end, costs rules should be amended to clearly direct courts to consider, in awarding costs at the conclusion of a proceeding, not only what time and expense may be involved in the proceeding but also what time and expense were justified, given the circumstances of the case.

In addition, counsel should as a matter of routine provide clients with a pro forma budget setting out, albeit in a somewhat imprecise way, the estimated cost (legal fees and disbursements, including expert witness fees) of commencing or defending a proceeding. Periodic updates should also be provided. There is, of course, no need for this in personal injury litigation where contingency fee arrangements are typical. Nor would this requirement be applicable to defence counsel retained by property (casualty) insurers who have developed their own methods of controlling solicitor and client cost exposure.

I stop short of specifically recommending that distributive cost orders (based on a party's relative success in the litigation) should be open to the court to a degree that does not apply now. It does, however, seem odd that a litigant who raises eight issues and loses on seven of them should receive a full set of costs if successful only on issue eight. Perhaps the settlement offer provisions of the rules provide a good enough answer. It is my hope that the Civil Rules Committee will see fit to revisit this issue.

Recommendations (Proportionality)

- **The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.**

- **Counsel should be required to prepare a litigation budget and review it with a client prior to commencing or defending any proceeding. This budget should be updated at least when examinations for discovery are completed. The Law Society of Upper Canada should also consider making this an express requirement for the profession under the Rules of Professional Conduct.**

- **The Civil Rules Committee should consider whether rule 57.01 should be amended to add, as a factor for the court to consider when making a cost award, the relative success of a party on one or more issues in the litigation in relation to all matters put in issue by that party. I make this recommendation not in the context of distributive cost orders (a subject on which the Court of Appeal has spoken), but rather in the context of court time which has been wasted in advancing frivolous claims or defences. It is one thing to advance claims or defences that manifestly have no merit. It is another thing to waste time doing it. Perhaps rule 57.01 (1) (e) is broad enough to capture my concern. I leave that to the Rules Committee.**

Appendix A:
Terms of Reference
Civil Justice Reform Project

Background

In 1996, the Ontario Civil Justice Review released its final report setting out an overall strategy to make Ontario's civil justice system speedier, more streamlined and more efficient. At around the same time, the Canadian Bar Association's (CBA) *Systems of Civil Justice Task Force Report* made recommendations, on a national basis, to develop strategies and mechanisms to assist in the continued modernization of the civil justice system. Since then, significant reforms have been implemented in Ontario to enhance access and affordability, including the introduction of simplified procedures, case management and mandatory mediation, as well as the increase in the monetary limit of the Small Claims Court to $10,000.

In 2001, the Government of Ontario and the Superior Court of Justice jointly appointed the Task Force on the Discovery Process in Ontario to identify problems with discovery and to make reform recommendations. In its 2003 Report, the Task Force made recommendations on two fronts. First, the Task Force recommended that enhanced cost- and time-saving mechanisms be incorporated into the Rules of Civil Procedure. At the same time, the Task Force acknowledged that not all discovery problems could be addressed simply by the imposition of more rules, and noted that many could be attributed to the adversarial "culture of litigation" or the conduct of particular lawyers. Accordingly, the Task Force made a second set of recommendations for the development of best practices to be adopted by the bench and the bar as appropriate conventions or norms for the conduct of discovery.

Ten years have now passed since the Civil Justice Review and the CBA released their respective reports. Many of their recommendations have been implemented throughout Canada with positive results. Ontario's ongoing civil justice reform strategy has been applauded for significantly enhancing access to justice.

Yet cost and delay continue to be cited in national and provincial reports as formidable barriers that prevent average Canadians from accessing civil justice. Recent conferences and policy forums have sought to further assess the state of Ontario's civil justice system and reform options. In March of 2006, the Advocates' Society held a Policy Forum, entitled *Streamlining Justice*, to search for creative ways to promote efficient, less expensive dispute resolution in our courts so that access to justice may be enhanced.[1] And in May of 2006, the Canadian Forum on Civil Justice hosted a national conference, entitled *Into the*

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[1] A copy of a the Advocates' Society report arising from this policy forum, entitled *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, may be accessed at: http://www.advocates.ca/pdf/Final_Report.pdf

Future: the Agenda for Civil Justice Reform. The Conference sought to examine a variety of issues, including the status of civil justice reforms in Canada, impediments to effective reform, and the development of a national direction for civil justice reforms in the future.[2]

Mandate

The Honourable Mr. Coulter Osborne will lead the Civil Justice Reform Project (CJRP). Its mandate is to review potential areas of reform and deliver recommendations for action to make the civil justice system more accessible and affordable for Ontarians. The proposals should be suitable for implementation within a reasonable amount of time and provide meaningful results in enhancing access to justice for Ontarians. Mr. Osborne has been asked to submit a final report to the Attorney General by the late spring of 2007.

In conducting its review, the CJRP will (a) identify key areas for reform; (b) develop reform options; and (c) make specific recommendations as to which of the proposed options would best achieve the CJRP's objectives. Possible areas of reform for consideration include:

- Expert evidence
- Discovery
- Adversarial litigation culture
- Simplified procedure
- Summary judgment
- Pre-action protocols

Guiding Principles

The work of the CJRP will take into account the following principles and considerations:

- **Access**: Recommendations should promote access to justice for both represented and unrepresented litigants.
- **Proportionality**: Recommendations should reflect the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and/or the importance of the issues at stake.
- **One size does not fit all**: Recommendations should recognize diversity and the different issues facing different jurisdictions, particularly larger urban centres such as Toronto.
- **Culture of Litigation**: Recommendations should recognize that rule and other regulatory reform alone might not adequately respond to problems in

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[2] Papers from the Canadian Forum on Civil Justice's *Into the Future* Conference may be accessed at: http://www.cfcj-fcjc.org/IntoTheFuture-VersLeFutur/

the system. Ways to foster "cultural change" among the bench and bar should be considered.

Methodology

In conducting this review, the CJRP will engage in province-wide consultations, research relevant civil justice studies and literature, including recent reforms in other jurisdictions, and consider available quantitative and qualitative data.

Support

An Advisory Committee will assist Mr. Osborne. Members of the Advisory Committee will be selected by Mr. Osborne and are to be representative of the diversity of the province. A Project Director and other counsel at the Ministry of the Attorney General will also provide assistance.

APPENDIX B: CONSULTATION PAPER

Civil Justice Reform Project Mandate

On June 28, 2006, Attorney General Michael Bryant asked the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project (CJRP). Mr. Osborne has been asked to propose options to reform the civil justice system to make it more accessible and affordable for Ontarians. Recommendations for action are to focus on proposals which will produce meaningful results in enhancing access to justice for Ontarians and which will be suitable for implementation within a reasonable amount of time.

In conducting this review, the CJRP will engage in province-wide consultations, research relevant civil justice studies and literature, recent reforms in other jurisdictions, and consider available quantitative and qualitative data. A final report is anticipated in the late spring of 2007.

The work of the CJRP will take into account the following principles and considerations:

- **Access:** Recommendations should promote access to justice for both represented and unrepresented litigants.
- **Proportionality:** Recommendations should reflect the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and the importance of the issues at stake.
- **One size does not fit all:** Recommendations should recognize diversity and the different issues facing different jurisdictions, particularly larger urban centres such as Toronto.
- **Culture of litigation:** Recommendations should recognize that rule and other regulatory reform alone might not adequately respond to problems in the system. Ways to foster "cultural change" among the bench and bar should be considered.

Comments & Suggestions Sought

This consultation paper outlines in general terms some of the problems that have been identified as areas where reform may be needed, as well as possible reform options. The CJRP invites comments on the issues canvassed below, and any other suggestions for improving the civil justice system in Ontario. Please take the time to respond by **November 17, 2006**. The views of those who use the civil justice system are very important to the CJRP, including both represented and unrepresented litigants. You may send your comments to Mohan Sharma, Project Director:

- ☐ By e-mail to CJReform@jus.gov.on.ca
- ☐ By fax to: (416) 326-4289
- ☐ By mail to: Mohan Sharma
  Project Director, Civil Justice Reform Project
  Ministry of the Attorney General
  720 Bay St., 2nd Floor
  Toronto, ON M5G 2K1

Civil Justice Reform Project

Background

In 1996, the Ontario Civil Justice Review released its final report setting out an overall strategy to make Ontario's civil justice system speedier, more streamlined and more efficient.[1] At around the same time, the Canadian Bar Association's (CBA) *Systems of Civil Justice Task Force Report* made recommendations, on a national basis, to develop strategies and mechanisms to assist in the continued modernization of the civil justice system.[2] Since then, significant reforms have been implemented in Ontario to enhance access and affordability, including the introduction of simplified procedures, as well as the increase in the monetary limit of the Small Claims Court to $10,000. In addition, case management and mandatory mediation were introduced in Toronto, Ottawa and Windsor. In May of 2005, the rules relating to case management and mandatory mediation were modified in Toronto on a three-year pilot basis by virtue of rule 78. Its operation is currently the subject of ongoing evaluation.[3]

In 2001, the Government of Ontario and the Superior Court of Justice appointed the Task Force on the Discovery Process in Ontario to identify problems with discovery and to make reform recommendations. In its 2003 Report, the Task Force found that discovery can result in unacceptable cost and delay in large complex cases, or where there is a lack of cooperation between opposing counsel, which can thereby impede access to justice.[4] The Task Force made recommendations on two fronts. The first was the incorporation of enhanced cost and time saving mechanisms into the Rules of Civil Procedure. However, the Task Force acknowledged that not all discovery problems could be addressed simply by the imposition of more rules, and noted that many could be attributed to the adversarial "culture of litigation", or the conduct of particular lawyers. Accordingly, the Task Force made a second set of recommendations for the development of best practices to be adopted by the bench and the bar as appropriate conventions or norms for the conduct of discovery.

Ten years have now passed since the Civil Justice Review and the CBA released their respective reports. Many of their recommendations have been implemented throughout Canada, with positive results. Ontario's ongoing civil justice reform strategy has been applauded for significantly enhancing access to justice.

Yet cost and delay continue to be cited in national and provincial reports as formidable barriers that prevent average Canadians from accessing the system. Recent conferences and policy forums have sought to further assess the state of Ontario's civil justice system and reform options. In March of 2006, the Advocates' Society held a Policy Forum, entitled *Streamlining Justice*, to search for creative ways to promote efficient, less expensive dispute resolution in our courts so that access to justice may be enhanced.[5] And in May of 2006, the Canadian Forum on Civil Justice hosted a national conference, entitled *Into the Future: the Agenda for Civil Justice Reform*. The Conference sought to examine a variety of issues, including the status of civil justice reforms in Canada, impediments to effective reform, and the development of a national direction for civil justice reforms in the future.[6]

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[1] Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, November 1996). Posted at: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/

[2] Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996). Posted at: http://www.cba.org/CBA/cba_Reports/pdf/systemscivil_tfreport.pdf

[3] Given the ongoing evaluation of rule 78 in Toronto, case management will not be a primary focus of the CJRP. However, comments are welcome on methods to improve or expand upon the use of mandatory mediation and other ADR mechanisms. See the section under "Litigation culture" below.

[4] Task Force on the Discovery Process in Ontario, *Report of the Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, November 2003). Posted at: http://www.ontariocourts.on.ca/superior_court_justice/discoveryreview/index.htm

As we mark the ten-year anniversary of the Civil Justice Review and the CBA report, it is appropriate to assess whether further refinements can result in meaningful improvements for those who use the system.

Issues for Consultation

The following discussion highlights areas in the civil justice system that may be in need of reform, as well as potential reform options. Respondents are invited to comment on any or all of these issues and in so doing, to consider the following questions:

- Which solutions are likely to have the most positive impact on making the civil justice system more accessible and affordable for Ontarians?
- Are the problems identified more acute in certain regions of Ontario than in others, or in certain case types than in others (e.g. medical malpractice, commercial)? Why?
- What reforms might best respond to the needs of unrepresented litigants?
- Are there feasible options to introduce greater technology into the civil justice system to help reduce the cost of litigation or to make it more accessible?
- Are there other areas of reform that should be addressed but are not mentioned in this consultation paper?
- Are there other solutions that you would recommend that are not mentioned in this consultation paper?

Simplified procedure

Lawyers, judges and litigants frequently observe that the simplified procedures in Rule 76 are not working as intended. Three key problems have been identified. First, counsel often disregard the prohibition on the use of discoveries in the rule, either by engaging in pre-trial discoveries or in effect conducting discoveries at trial. The result is that the cost- and time-saving benefits of this rule are not realized. Second, while Rule 76 allows parties to elect to proceed by way of summary trial, this method of hearing is rarely selected by the parties or ordered by the court. Accordingly, litigants are not reaping the cost- and time-saving benefits of the summary trial option. Third, the jurisdictional limit of Rule 76 is currently set at $50,000 (although Rule 76 may be used at the plaintiff's option for claims over $50,000 unless the defendant objects). Where a claim of a relatively modest value (e.g. between $50,000 and $100,000) does not proceed under Rule 76, the ordinary procedures regarding disclosure, discovery, experts, interlocutory motions and trials apply, and litigants may spend more time and money litigating such claims than is proportionate to the amount or issues at stake.

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[5] A copy of a the Advocates' Society report arising from this policy forum, entitled *Streamlining the Ontario Civil Justice System: A Policy Forum, Final Report*, may be accessed at: http://www.advocates.ca/pdf/Final_Report.pdf

[6] Papers from the Canadian Forum on Civil Justice's *Into the Future* Conference may be accessed at: http://www.cfcj-fcjc.org/IntoTheFuture-VersLeFutur/

Reform options include:

- Restrict length of oral discovery to a prescribed time limit (e.g. 2 hours per party).
- Require or encourage parties to proceed by summary trial in certain case types.
- Raise the monetary limit of Rule 76 to $100,000.

Use of expert evidence

The increased use of expert evidence in civil cases is generally regarded as contributing to the increased time and cost of litigation. In addition, it has been argued that experts increasingly adopt the polarized, adversarial bias of the parties who hire them, rather than assist the court in a neutral evaluation of an issue. The United Kingdom and Australia have both introduced reforms to the practices and procedures applicable to expert evidence. Some of these reforms require parties to agree upon a single jointly-appointed expert, impose obligations on opposing experts to consult and to produce a single joint report, or require an order of the court before any expert evidence may be adduced.

Reform options include:

- Require parties to retain a single, joint expert, except in cases where there is a compelling reason for separate experts. Alternatively, enhance the pre-trial or trial judge's power to exclude expert evidence.
- Where opposing parties retain different experts, require those experts to consult and prepare a single joint expert report for the court, or specifically identify the matters on which they disagree, and if practicable, the financial consequences on those areas where there is disagreement.
- Require experts to affirm that their duties are owed to the court, and not to a particular party.
- Require parties to file expert reports prior to the pre-trial conference. In addition, require experts to attend pre-trial conferences to permit the court to assist the parties in reaching a settlement of some or all of the issues.
- Require counsel to notify opposing parties where there is a dispute about the qualifications of an expert to give opinion evidence in accordance with all or part of the expert's report.
- Permit oral or written examination for discovery of experts on the content of their reports.
- Dedicate pre-trial hearings to issues relating to expert evidence.

Discovery

The Task Force on the Discovery Process in Ontario released its Report in November 2003.[7] The Task Force made recommendations for specific rule amendments intended to save time and cost. Several of these recommendations have not yet been incorporated into the Rules of Civil Procedure. The Discovery Task Force also recommended the development of best practices to provide lawyers and the court with practical suggestions on how best to manage discovery-related issues. Best practices for the conduct of electronic discovery were released in the fall of 2005.

Reform options include:

- Impose a default time limit of 7 hours per party on oral discovery, subject to the parties' agreement otherwise or a court order.
- Require parties to participate in early discovery planning, and to commit to a plan in writing.
- Narrow the scope of discovery (eliminate the "semblance of relevance" test and replace it with a standard "relevant" or "relating to" test).
- Encourage greater use of written discovery (e.g. allow both oral and written discovery on parties' consent, or by court order, provided there will not be duplication and discovery will be conducted in a cost-effective manner).
- Increased sanctions and greater consistency in sanctions for abuse of the discovery process.

Litigation culture

Numerous studies in Canada and abroad have identified the adversarial nature of litigation as a key factor contributing to cost and delay in the civil justice system. The notion that legal disputes are best resolved through a contest between competing adversaries remains strongly held by lawyers in common law jurisdictions. This emphasis on adversarialism results in demands for more disclosure, more experts, more discovery, more interlocutory motions, and longer trials. A related concern is an increasing lack of civility among the civil litigation bar, which appears to be particularly acute in large urban centres. There is a general consensus that lawyers in smaller communities and specialty practices tend to be more collegial than those in large urban centres.

Reform options include:

- Introduce new rules that restrict opportunities for adversarialism and encourage early resolution of disputes (e.g. use of joint experts, early discovery planning, pre-action protocols).
- Greater opportunities for alternative dispute resolution ("ADR") (e.g. make ADR mandatory as a pre-condition to commencing litigation, increased use of mandatory mediation or voluntary mediation).

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[7] See Task Force on the Discovery Process in Ontario, supra.

- ☐ Encourage bench and bar to participate in the development of best practices to minimize impact of adversarial litigation culture.
- ☐ More active role played by the Law Society of Upper Canada in overseeing lawyers' conduct that results in additional cost and delay to litigants.
- ☐ Greater imposition of personal cost sanctions against lawyers who cause delays through intransigence and a lack of civility.
- ☐ Emphasize civility and more cooperative dispute resolution in legal education.

Summary judgment

Rule 20 permits a court to grant summary judgment if there is "no genuine issue for trial." Many complain that this rule is not working as was intended because the common law threshold for establishing that there is no genuine issue for trial is extremely high. The result is that there is not an effective mechanism for screening out frivolous or unmeritorious claims.

Reform options include:

- ☐ Amend Rule 20 to set a new threshold. For example, "no genuine issue for trial" could be replaced with "no real prospect of success."
- ☐ Amend Rule 20 to allow a court to order summary judgment, even when there are disputed facts, after undertaking a limited review of affidavit evidence addressing the disputed facts.
- ☐ Where there is a factual issue in dispute that would prevent the court from granting summary judgment, improved trial scheduling practices could be implemented to permit the court to hold a "mini-trial", forthwith, that is restricted to the disputed factual issue.

Pre-action protocols

Pre-action protocols set out rules and timelines for the exchange of certain information before a party can commence an action. They are premised on the idea that civil actions are not resolved at an early stage because parties lack adequate information about their opponent's case. Accordingly, pre-action protocols are intended to provide for the early exchange of information to permit early settlement of cases before the court even becomes involved. Certain pre-action protocols may work to weed out cases early, or at least unnecessary parties, at the front-end of the litigation process.

Pre-action protocols were a cornerstone of the Lord Woolf reforms introduced in the U.K. At present, there are protocols in place for eight types of civil disputes, including professional negligence, personal injury, and housing and repair. Pre-action protocols have also been introduced in Australia (Queensland) for personal injury disputes. The Queensland rules also require parties to exchange offers to settle as well as information about the dispute, with cost consequences for parties who reject unreasonable offers.

Pre-action protocols have been very effective in promoting early settlement of cases. However, they have also been criticized for raising litigants' costs for certain case types early in the litigation process.[8]

Reform options include:

- ❑ Introduce pre-action protocols for specific case types on a pilot basis (i.e. case types determined to involve the greatest amount of delay)

Civil Juries

The *Courts of Justice Act* permits a party, as of right, to have a civil jury trial to assess damages or decide issues of fact in most civil actions in the Superior Court of Justice. A party may select a jury trial by delivering a jury notice. While there is some authority for the court to dispense with a jury on the motion of a party, case law suggests that trial judges do not have the authority to dispense with a jury on their own initiative.

Jury trials may add to the cost and complexity of a trial, which may be disproportionate to the amounts or importance of matters in issue. Furthermore, where the issues in a trial are so complex that a typical jury would not be able to discharge its responsibilities effectively, the merits of having a jury trial are questionable. On the other hand, given the history of jury trials, they may now be seen to be a substantive right which also ensures public participation in the civil justice system.

Reform options include:

- ❑ Eliminate access to civil jury trials in all civil cases.
- ❑ Eliminate access to civil jury trials in all cases, except those where the predominant issues in the action concern the values, attitudes or priorities of the community.
- ❑ Eliminate access to civil jury trials in all civil cases below a fixed monetary threshold (*i.e.* $50,000, or a larger amount).
- ❑ Provide trial judges with the authority to dispense with a jury trial where they are of the view that the trial will be so complex that the jury will be unable to discharge its duties, or where a jury trial is otherwise unwarranted given the nature and importance of the matters.

Cost of civil litigation

A tension exists between the bar's stated intention to confront the problem of cost and delay in the civil justice system on the one hand, and the hourly billing structure common among the profession that arguably discourages efficiency and early problem solving on the other. Allowing market forces to fully dictate the cost of legal services reduces lawyers' ability to provide pro bono services, impedes access to justice, and erodes the public's confidence in the legal profession.

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[8] See, Robert Musgrove, Civil Justice Council, "Lord Woolf's Reforms of Civil Justice. The reforms, their impact, and the future for civil justice reform in England and Wales" (Paper presented to the Advocates' Society Policy Forum, 9 March 2006) [unpublished].

Reform options include:

- Explore alternatives to the hourly billing model, including fee-for-service billing.
- Require lawyers to provide their clients with a detailed litigation plan for each case. Litigation plans would include time and cost estimates for each step and may include penalty clauses for non-compliance.
- Require lawyers/law firms to devote a prescribed number of hours to pro bono work annually. This could include providing civil duty counsel services at the Superior Court.

Trial Management

The number of actions that actually go to trial is estimated at approximately 2% of all actions commenced. However, it has been argued that cases are increasingly complex, involving more parties, more documents, and more experts, which can result in an increase in the length of time it takes to hear those cases that do proceed to trial. In some cases a lengthy trial is the inevitable result of complex issues and facts. However, anecdotally, some say that more long trials are being held even when the amount or issues at stake do not warrant it.[9] Poor trial management, late requests for trial adjournments, late disclosure of expert reports, and the presence of unrepresented litigants may also contribute to lengthier trials or delays in obtaining trial dates.

Reform options include:

- Enforcement of fixed trial dates, without opportunity for adjournment, except in cases of emergency (e.g., illness or death of a lawyer or witness).
- Greater involvement by the pre-trial judge in trial management. Examples include the issuance of pre-trial orders fixing the time for completion of all pre-trial steps, and time limits for the trial (i.e. each party is allotted a fixed number of hours to complete all steps within a trial, or a time limit for each step of the trial is ordered).
- Impose sanctions on parties who fail to adhere to time limits.
- Require examinations-in-chief and expert evidence to be submitted by way of affidavit.
- Promote and seek greater judicial control over the trial process during the trial.
- Provide more resources to unrepresented litigants (e.g. civil duty counsel).

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[9] See Advocates' Society Report, supra at p. 18.

Appendix C
List of Organizations Consulted

The organizations and groups with which consultation meetings were held are (in alphabetical order):

- ADR Professionals
- Algoma District Law Association
- Association des juristes d'expression française de l'Ontario
- Association of Canadian General Counsel
- Benchers of the Law Society of Upper Canada
- Canadian Bankers Association
- Canadian Defence Lawyers
- Canadian Medical Protective Association
- Case Management Masters
- Central East Judges
- Central West Judges
- Civil Rules Committee
- Commonwealth Legal
- County and District Law Presidents Association
- County of Carleton Law Association, with eight East Region Bar Associations
- Court Services Division – Court Managers, Ministry of the Attorney General
- Crown Law Office – Civil, Ministry of the Attorney General
- Department of Justice (Canada)
- East Region Judges
- Elgin Law Association
- Essex Law Association
- Financial Services Commission of Ontario
- Hamilton Law Association
- Insurance Bureau of Canada
- Lawyers' Professional Indemnity Company (LawPRO)
- Medico-Legal Society of Toronto
- Middlesex Law Association
- Municipal Lawyers Association
- Ontario Bar Association
- Ontario Deputy Judges' Association
- Ontario Trial Lawyers' Association
- Paralegal Society of Ontario

- Peel Law Association
- Pro Bono Law Ontario
- Regional Senior Justices & Regional Managers
- Representatives of Specialty Legal Clinics
- Senior Management Committee, Ministry of the Attorney General
- Simcoe Law Association
- Small Claims Court Judges
- Sudbury District Law Association
- Thunder Bay Law Association
- Toronto Lawyers' Association
- Toronto Small Claims Court Judges
- Waterloo Law Association
- Wellington Law Association
- Unrepresented Litigants

In addition, individual consultation meetings were held with the Office of the Chief Justice of Ontario, the Office of the Chief Justice of the Superior Court of Justice, individual Superior Court judges in most regions of the province, and select law firms.